American Warehousing & Distribution Services, Inc., d/b/a Treanor Moving & Storage Company, Inc. *and* Local No. 243, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–32367, 7–CA–32598, and 7–CA–32869

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On October 30, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) by engaging in the following unilateral conduct: shifting bargaining unit work to nonbargaining unit employees; reducing the work hours of its unit employees; changing its policies regarding the employees' use of automobile parking and telephone usage; restricting the employees' access to the Respondent's administrative offices. No exceptions were filed to the judge's dismissal of allegations that the Respondent unreasonably delayed meeting with the Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In this respect, the Respondent contends that in crediting the testimony of employee Casey Stamps the judge relied on his mistaken belief that Stamps was employed by the Respondent at the time of the hearing. In fact, the judge's crediting Stamps was not based on any such incorrect finding. At one point, in discussing the Respondent's defense to allegations that it unlawfully reduced the work hours of employee Ray Rodriguez, the judge inadvertently stated that Respondent President Donald Treanor testified that Stamps was still working for the Respondent. The record shows Stamps left the Respondent's employ in May 1992, 2 months before the hearing. Nonetheless, we do not read the judge's inadvertent error to be critical or even significant in his decision to credit Stamps. Indeed, in discussing credibility, the judge relied on his observation of the witnesses and found on that basis that Stamps and employee Gary Gavette were more credible than Treanor. Further, Stamps' testimony was corroborated in significant respects by Gavette who was, as the judge correctly noted, in the Respondent's employ at the time of the hearing.

The Respondent also claims that the judge's finding that it announced an attendance policy crackdown in retaliation for the employees having voted for the Union is unsupported by credible testimony. We disagree. In finding that Dispatcher Thomas Wyzgoski's announcement of the crackdown violated Sec. 8(a)(1) of the Act, the judge impliedly credited the testimony of Ray Rodriguez that Wyzgoski said: ''We used to let you guys get away with this kind of stuff. But now you are union and you guys are playing your game and the company is going to have to play by their game.'' The judge explicitly credited this testimony in finding that Rodriguez' discipline pursuant to the attendance policy violated Sec. 8(a)(3) and (1) of the Act.

The Respondent contends that the judge's finding that the Respondent decreased Ray Rodriguez' hours of work in violation of Section 8(a)(3) and (1) of the Act is based on an erroneous finding that summerhire Rich Masfern performed work that should have been done by Rodriguez. In fact, the judge found that Dispatcher Thomas Wyzgoski, a statutory supervisor, displaced Rodriguez. The record supports the judge's conclusion.

The Respondent also asserts that in discussing the Respondent's discriminatory enforcement of its attendance policy the judge incorrectly found that Dispatcher Thomas Wyzgoski admitted that there is nothing in the policy regarding call-in time. The judge's statement—''Wyzgoski admitted that there is nothing in the policy regarding the time when the late employee must call him with regard to the employee's scheduled starting time''—accurately reflects Wyzgoski's testimony about the written policy. We note that earlier in his decision the judge summarized Wyzgoski's testimony that in practice employees were required to call in at or prior to their reporting time; that Wyzgoski informed employees of the attendance policy by giving them a copy of the written policy; and that he sometimes orally advised employees of the policy and sometimes did not. We further note that the judge found that the Respondent violated Section 8(a)(3) and (1) not by changing its rules regarding attendance, but rather ''by changing its policy and practice regarding *enforcement* of its attendance policy.''

The Respondent also argues that the General Counsel failed to show that the Respondent was aware of union activity by Gary Gavette and Casey Stamps when it disciplined them under the attendance policy. In fact, the judge correctly found that this specificity is not required where, as here, the General Counsel shows that the Respondent's conduct was discriminatorily motivated against all its employees. See *Davis Supermarkets*, 306 NLRB 426 (1992).

The Respondent further contends that its discipline of Gary Gavette pursuant to the attendance policy was not discriminatory because it occurred 12 months after the election. Certainly timing is a critical factor in finding discriminatory conduct. The passage of time may weigh against such a finding but does not preclude it. Here the Respondent misstates the time lapse. The election occurred in July 1991. The judge relied on statements made by Dispatcher Wyzgoski the following October and by President Donald Treanor the following November in finding that the Respondent discriminatorily enforced its attendance policy. Accord-

ingly, the time lapse at issue is 8 months rather than 12. Moreover, the Respondent did not discipline new employee Steve Greenwood for similar infractions of the attendance policy at the very time the Respondent disciplined Gavette who was employed at the time of the election. Under these circumstances, we agree with the judge that Gavette was disciplined pursuant to the attendance policy in violation of Section 8(a)(3) and (1) of the Act. See *Carambola Beach Hotel & Golf Club*, 307 NLRB 915, 927–928 (1992) (Analysis and Concluding Findings).

Finally, contrary to the Respondent, the judge also correctly found that the employees' preexisting right to remain on the Respondent's premises after punching-out time was a term and condition of employment. See *Accurate Die Casting Co.*, 292 NLRB 989 (1989).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Warehousing & Distribution Services, Inc., d/b/a Treanor Moving & Storage Company, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mary Beth Foy and *Catherine L. DuBay, Esqs.*, for the General Counsel.

Shelley K. Coe, Esq., of Southfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Detroit, Michigan, on July 20–22, 1992, on the General Counsel's second consolidated amended complaint dated March 18, 1992,[1] which alleges, in substance, that the above-captioned Respondent, American Warehousing & Distribution Services, Inc., d/b/a Treanor Moving & Storage Company, Inc. violated Section 8(a)(1), (3), and (5) of the Act by statements of its supervisors; by various acts of unlawful discrimination, and by various acts constituting a refusal to bargain with the Union, all occurring in the months of July, August, October, and November 1991; and by various unlawful unilateral acts, contrary to its bargaining obligation, in January 1992.

Respondent's timely filed answer, dated January 16, 1992, denied certain allegations of the consolidated complaint, admitted others, but denied the commission of unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs which have been received and carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, comparing such testimony with the interest of the witnesses, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that at all material times Respondent, a Michigan corporation, has maintained its principal office and place of business at 25 West Walton Boulevard, Pontiac, Michigan (with another facility located at 5321 Dixie Highway, Drayton Plains, Michigan), where it has been and is engaged in the moving and storage business. During the fiscal years ending September 30, 1990 and 1991, representative periods of Respondent's operations, Respondent, in the course and conduct of its business operations had gross revenues in excess of $1 million and purchased goods and materials valued in excess of $50,000 from points located outside the State of Michigan, and caused such goods and materials to be transported directly to its Michigan facilities. Respondent concedes and I find that at all material times it has been and is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.[2]

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Charging Party (the Union), Local No. 243, International Brotherhood of Teamsters, AFL–CIO, has been and is, at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent commenced operations on February 10, 1990. It is engaged in two distinct lines of business: (1) moving and storage; and (2) commercial warehousing. Its moving and storage business consists of moving and storage of residential and commercial materials in both interstate and intrastate. Its commercial warehousing operation involves the storage and distribution of materials principally owned by large enterprises.

In May 1991, Respondent's employees, led by employees Rodriguez and Stamps, sought representation by Local No. 243, IBT (the Charging Party). On May 29, 1991, the Union filed a petition for certification, having already conducted meetings at the homes of employees Gary Gavette, Ray Rodriguez, and Tony Brown.

On July 12, 1991, 15 of Respondent's employees voted in a Board-conducted election. Nine votes were cast for the Union; six were cast against the Union. On July 22, 1991, the Board certified the Union as the statutory representative

[1] The charge and amended charge in Case 7–CA–32367 were served on September 25 and November 5, 1991; the charge in Case 7–CA–32598 was served on November 21, 1991; the charge and amended charge in Case 7–CA–32869 were served on Respondent on February 5 and March 14, 1992.

[2] Respondent also admits that its president, Don Treanor, its vice president, Rich Treanor, and its dispatcher, Tom Wyzgoski, are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act.

of employees in the following unit which Respondent admits to be appropriate within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, helpers and warehouse employees employed by the employer at or out of its facility located at 25 West Walton Boulevard, Pontiac, Michigan, and at or out of its facility located at 5321 Dixie Highway, Drayton Plains, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

Respondent concedes that since July 22, 1991, the Union has been the exclusive representative of unit employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

B. *Respondent's July 1 and 11, 1991 Meetings with its Employees*

The consolidated complaint, as amended at the hearing, paragraph 8(a), alleges that on or about July 1 and 11 (as well as September and October 1991), Respondent's president, Don Treanor, told employees that it would be futile for them to select the Union as their collective-bargaining representative and that they would never get a contract, all in violation of Section 8(a)(1) of the Act.

As above noted, the Board-conducted election occurred on July 12, 1991. On July 1, Respondent called a meeting of its employees at the Holiday Inn in nearby Auburn Hills, Michigan. Employee Rodriguez testified that, at the meeting, President Don Treanor had only one thing to say and that was that he was going to come to no agreement with the Union (Tr. 173). Most of the employees were present when he said this (Tr. 229–230). Don Treanor denied making the statement. Indeed he testified that he made no comment on a union contract at that time. In view of my findings, below, with regard to a subsequent employer-sponsored meeting of July 11, 1991, it is unnecessary to resolve this credibility conflict between employee Rodriguez and President Treanor.

On July 11, 1991, Respondent called a meeting of its employees at about 7 a.m. in its Pontiac warehouse. Employees Casey Stamps and Gary Gavette (presently employed by Respondent) testified that at the July 11, 1991 meeting, 1 day before the election, in the dispatch room, in the presence of his brother, vice president Rich Treanor, Dispatcher Tom Wysgoski, most of the employees (and representatives of Respondent, not employees, who were apparently labor relations consultants) President Treanor told the employees, in an angry voice, that if the employees turned ''[our] back against him by voting for the union, that he would get the roughest, toughest negotiator and that we would not get a contract'' (Tr. 81). Employee Gavette recalled that after the Respondent's agents (''Connie'' and others) told the employees that the Union would not benefit them, how union dues would be deducted each month, and that Respondent could work out problems without the Union becoming involved (Tr. 136), Don Treanor told the employees that there would be no union contract and that he would bring in the worst negotiators (Tr. 136–137).

While Treanor admits calling the meeting in the warehouse, he denied telling the employees that they would never get a contract and denied saying that he would get a rough, tough negotiator. Rather, he testified that he told them that he would get a ''skilled'' negotiator. He further testified that he had received legal advice on what he should say in his speech and that he knew that it was unlawful to say that the Union would never get a contract.

Upon my observation of Treanor, on the one hand, and employee Stamps and Gavette on the other hand, with Gavette being presently employed by Respondent at the time he gave his testimony, I credit employees Stamps and Gavette and discredit the testimony of President Don Treanor. I find that President Treanor told the employees, 1 day before the election, that if they turned their back against him and voted for the Union, Respondent would get the roughest, toughest negotiator and the employees would not get a contract. Such statements, as alleged in the complaint, demonstrate that it would be futile for the employees to select the Union because Respondent would never give them a contract, which statements violates Section 8(a)(1) of the Act. *Outboard Marine Corp*., 307 NLRB 1333 (1992).

C. *Statements in August 1991 by Don Treanor Regarding the Employees' Selection of the Union*

Employee Gary Gavette credibly testified, without contradiction, that in August 1991 he was present in the dispatch office with employee Bill Pitts, who had been recently demoted from his job as a driver to that of a helper. Pitts asked President Treanor why his, and other employees', hours were being cut. Treanor answered: ''I don't have the work. You stabbed me in the back by voting for the union'' (Tr. 139).

Later in August, in the same dispatch office, in the presence of employees and Dispatcher Wysgoski, President Treanor was wearing a sweatshirt bearing a logo from the Grand Prix. The employees asked him if he had purchased any extra shirts for them. Treanor told them that ''when you guys voted the union in, you voted out stuff like this [and] free lunches. You guys stabbed me in the back, I am going to stab you in the back. No more family atmosphere around here, things are going to change'' (Tr. 140). Before the union election, when the employees were involved in big office moves, requiring 20 employees and perhaps four or five trucks, Don Treanor sometimes bought lunch for the crews (Tr. 141). After the union election, he did not do so.

Don Treanor admitted being in the dispatch area when the sweatshirt or T-shirt was discussed but denied saying that the employees had stabbed him in the back; denied, with regard to his allegedly purchasing ''lunches,'' that he told the employees that things were going to change and there would be no more lunches; and could not recall if he said that there was less work available. He testified that he told the employees that he did not purchase the shirts for them because it could be said that he would thereby be ''buying'' the employees' votes.

According to Gavette's credited testimony, President Treanor's remarks to the employees concerning the Grand Prix sweatshirt occurred in late August 1991. I did not understand Treanor's testimony that he told them that he had not purchased these shirts for them because it could be seen as his ''buying'' their votes. The employees voted in the union election a month before this. Treanor's testimony makes no sense.

I conclude that President Treanor told assembled employees, in the dispatch office, both in early and in late August

1991, that they had stabbed him in the back by voting for the Union and that they thereby voted out the family atmosphere in the shop; and that things were going to change (Tr. 140–141).

Paragraph 8(b) alleges that in August 1991 President Don Treanor threatened to accord employees less favorable treatment as a consequence of their having selected union representation. Crediting Gavette's testimony and discrediting President Treanor's denials, I conclude that Treanor told the employees that they had stabbed him in the back by voting for the Union; that he was going to stab them in the back; that there would be no family atmosphere thereafter; and that things were going to change (Tr. 140). As alleged, Treanor's threats to stab the employees in the back and his statement that their having voted the Union ''in'' necessarily ''voted out'' the family atmosphere and Respondent's providing free lunches for employees (Tr. 140) constitute threats of less favorable treatment as a consequence of employees having selected the Union. Such statements violated Section 8(a)(1) of the Act.

D. *President Treanor's October Statement to Employee Thomason*

Sometime in September 1991, President Treanor, while speaking to employees David Thomason, Ken Kunkle, and others, was trying to discover who had voted for the Union. Although he did not hear what Treanor said to cause Kunkle to make a response, Thomason recalls that Kunkle said to Treanor: ''Don, hey, I didn't vote for the Union. You know'' (Tr. 27–28).

On October 1, while Thomason was speaking with President Treanor at the front dock, Treanor said that the employees should not have joined the Union; that they were stupid for voting for the Union; and that the employees would never get a contract (Tr. 22). As they were walking toward the office, they were joined by Dispatcher Tom Wyzgoski. Wyzgoski told Thomason that he had ''the most to lose by going for the union'' (Tr. 24). When Thomason asked Wyzgoski what he meant, Wyzgoski said that it was ''because you make the most money'' (Tr. 25).

Dispatcher Tom Wyzgoski did not testify regarding this matter. President Treanor denied that he ever told Thomason that it was stupid to vote for the Union; that the employees would never get a contract and that they should not have joined the Union (Tr. 348). He also testified that he could not recall being present at a conversation between Wyzgoski and employee Thomason in which Wyzgoski told Thomason that he had a ''lot to lose by participating in the Union because [Thomason makes] the most money'' (Tr. 348–349).

Paragraph 8(c) of the consolidated complaint alleges that in October 1991 Treanor threatened an employee by telling him that he had more to lose than other employees by supporting the Union. Under the circumstances, with Wyzgoski not testifying and Treanor either denying or having no recollection, I credit Thomason and conclude, as alleged in the complaint, that Respondent violated Section 8(a)(1) of the Act when Dispatcher Wyzgoski, in President Treanor's presence, on or about October 1, 1991, told Thomason that he had more to lose than other employees in his support of the Union because he made more money than other employees.[3]

E. *The Alleged Announcement of an Attendance Policy Crackdown on or About October 10, 1991*

The complaint, paragraph 8(d), alleges that on or about October 10, 1991, in violation of Section 8(a)(1) of the Act, Dispatcher Wyzgoski announced an attendance policy crackdown because the employees had formed a union.

Sometime in October 1991 (Tr. 439), warehouseman Ray Rodriguez, on a Friday or Saturday, failed to arrive for work at the starting time of 8 a.m. and arrived at the warehouse at 3 p.m. (Tr. 188–189). He did not telephone the employer to tell him he was going to be late and he did not punch in for work at 3 p.m. Rather, he told Dispatcher Wyzgoski that he would not work that day and said that he had not telephoned Respondent because of personal problems (Tr. 189; 439). Wyzgoski told him that he would see him on the next scheduled workday (Monday). On the next scheduled workday, Rodriguez met with Wyzgoski and President Don Treanor (Tr. 184). In that meeting, Wyzgoski explained Respondent's attendance policy (Tr. 184); told Rodriguez that he had been marked down as a ''no-show'' for not showing up for work (Tr. 441); that he had no choice in the matter and was obliged to suspend him for a week. Wyzgoski also said that the 1-week disciplinary suspension was merited, under the policy, because this was only the first occurrence of a Rodriguez ''no-show.'' For a second occurrence, there would be a 2-week suspension and a third one would result in a 30-day suspension. The fourth such occurrence would result in discharge (Tr. 184).

Rodriguez had received a copy of Respondent's policy concerning attendance (G.C. Exh. 3) prior to this occurrence. That company policy concerning attendance, dated September 29, 1988, contains the following admonitions:

> (h) A phone call to the operations manager will be required when an employee is unable to report to work by the reporting hour.
>
> (i) The words ''No Show'' shall appear under the heading of job description when an employee neither reports to work nor contacts the operations manager. No Shows are considered highly irresponsible and shall be penalized in the following manner:
>
> (1) First occurrence—one week off without pay.
> (2) Second occurrence (same year)—one month off without pay.
>
> (3) Third occurrence–termination from Treanor Moving and Storage Co.
>
> No Shows shall remain on employee's record for a period of (1) year form the date of occurrence.[4]

[3] By September 1991, President Treanor knew that employee Dave Thomason was named the Union's employee bargaining representative (Tr. 20–21).

[4] Rodriguez' testimony concerning a fourth step of disciplinary process for ''no shows'' (Tr. 184–185) differs from the actual written policy. The written policy shows that the first no show is punishable by a week off without pay; the second punishable by 1 month without pay and the third punishable by discharge. I find Rodriguez' testimony to be incorrect and mistaken.

Dispatcher Wyzgoski testified that, after he told Rodriguez that he had no choice but to give him a 1-week suspension, he asked Rodriguez why Rodriguez had not telephoned Wyzgoski to let him know of his problems. Wyzgogki admits that Rodriguez told him that he did not know that hehad to call in (Tr. 441). In this same regard, Wyzgoski admitted that there was nothing in the written policy concerning the *time* the employee had to call in reference to a starting time (Tr. 427). As a matter of practice, however, Wyzgoski testified that, under the attendance policy, an employee was required to telephone Wyzgoski at or prior to the reporting time (Tr. 427–428). Wyzgoski also admitted that he is responsible for informing employees about Respondent's attendance policy (Tr. 430), and that the method by which he inform employees is to give them a copy of the company policy. Although he sometimes orally advises employees of the policy, that is not a fixed procedure. Wyzgoski sometimes verbally advises them and sometimes does not (Tr. 43).

Rodriguez testified, however, that after Dispatcher Wyzgoski informed him of the Respondent's attendance policy, he told Rodriguez: ''We used to let you guys get away with this kind of stuff. But now you are union and you guys are playing your game and the company is going to have to play by their game'' (Tr. 190–191).

The complaint, as above noted, alleges that this October 1991 Wyzgoski statement was the announcement of an attendance policy crackdown because the employees had formed a union. Although Wyzgoski testified at length concerning this conversation with Rodriguez, he did not deny Wyzgoski's testimony. Wyzgoski told Rodriguez that Respondent ''used to let you guys get away with this kind of stuff. He then said: ''but now you are union'' and ''the company is going to have to play by their game'' (Tr. 191). This indicates a change in Respondent's attendance policy *enforcement* so that Respondent was going to strictly apply its attendance policy in retaliation against the employees having brought in the Union. This is consistent with President Treanor's warning to the employees that the employees having ''stabbed him in the back,'' he was going to ''stab back.''

I conclude that, as alleged in paragraph 8(d) of the complaint, Respondent in October 1991 announced an attendance policy crackdown in retaliation for the employees having joined and formed the Union, in violation of Section 8(a)(1) of the Act.

F. *Alleged Violations of Section 8(a)(3) of the Act Regarding Particular Employees*

In paragraph 9 of the consolidated complaint, the General Counsel alleges that since on or about July 13, 1991, Respondent reduced the work hours of certain unit employees including, but not limited to, Ray Rodriguez, Gary Gavette, and Casey Stamps because of their union activities and in retaliation for the Union's victory in the July 12, 1991 election.

In measuring the legal consequences of events, as hereinafter enumerated, I am necessarily mindful of the credited testimony of the General Counsel's witnesses concerning President Don Treanor's explicit retaliatory motivation in consequence of employees having chosen the Union in the July 12 election. Not only is there President Treanor's repeated threat to retaliate against employees because they stabbed him in the back and he would now stab them in the back; but there is the similar Wyzgoski retaliatory statement that, because unit employees had chosen the Union, Respondent was no longer going to permit them to get away with rule violations and would more strictly enforce Respondent's work rules.

(1) David Thomason's loss of the ''container runs''

As above noted, by September 1991, Respondent knew that Thomason was named by the Union as the employee-member of its contract bargaining committee.

Thomason, Respondent's principal warehouseman, worked in the warehouse from approximately 7:30 a.m. to 5 p.m. each day and was carried on Respondent's direct payroll for such hours.

Sometime around July 1990, Thomason, believing that he was earning too little from his job, spoke to President Treanor about this situation. At a lunchtime meeting, he was informed that he would be given the ''container runs'' (Tr. 67–68). In a ''container run,'' Thomason drove 30 miles to a Detroit railyard junction to pick up overseas freight containers and return them on the truck to Respondent's Pontiac, Michigan yard.

Although his container runs were supposed to occur prior to and after his normal warehouse work hours, especially since his payment for container runs was by separate checks with separate withholdings, in practice, he would occasionally end the container runs arriving at the warehouse after 7:30 a.m., (Tr. 485–486), and also would leave the warehouse at 2:30 p.m., thus starting the container run well prior to the ordinary warehouse quitting time of 5 p.m. (Tr. 486). In short, because of the container runs, Thomason would sometimes arrive late for starting time and would leave early prior to quitting time depending on the anticipated amount of work at the warehouse (Tr. 485).[5] Thomason's workweek, commencing July 1990, was between 70 and 80 hours per week (Tr. 62–63) and did not fluctuate on a seasonal basis (Tr. 63).

Respondent ceased giving him the container runs around late September or early October 1981 (Tr. 64) reducing Thomason's hours to about 40 hours per week (Tr. 36; 62). The container runs were given to employees Chuck Nurburger and Ken Kunkle. One of them was a furniture helper and the other a driver. Kunkle was outspokenly against the Union and made this position known to President Treanor in September 1991, when Treanor was trying to find out who had voted for the Union (Tr. 26–28). Kunkle told Treanor that he did not vote for the Union (Tr. 28). Nurburger was not involved in the union organizing drive (Tr. 39). Neither Nurburger's nor Kunkle's hours were cut after the union election. They worked every day and their timecards showed no cut in hours (Tr. 91).

President Treanor and Dispatcher Wyzgoski testified, in substance, that they removed Thomason from the container runs because of a change in business operations forced on Respondent. They testified that the container runs are performed solely for single customer, General Motors-Fanec.

[5] Ordinarily, he would commence the container run at 5 a.m. and arrive at the warehouse sometime at about 7:30 a.m. to commence his warehouse workday. He would ordinarily leave for the afternoon container run at about 5 p.m., after the warehouse workday, and return to the warehouse yard with the containers at about 8 p.m.

This organization produces robots in Japan and markets them in the United States through General Motors. They further testified that, historically, the railyard junctions, at which the robots were originally picked up, operated either on a 24-hour basis or were open for pickups and deliveries at least as early as 6 or 7 a.m. and as late as 8 p.m. Such railroad yard hours, they testified, permitted the use of David Thomason, employed for almost 10 years by Respondent, to enjoy the further income ($60 for each round trip) from the container runs. Respondent could use Thomason on the container runs because Thomason's warehouse hours (7:30 a.m. to 5 p.m.) would permit Thomason to leave his home as early as 5 a.m. and, in the 2 or more hours necessary for container pickup and transportation, to arrive at the warehouse at or about 7:30 a.m. in time to commence his warehousing duties. It also permitted him to leave the warehouse after his warehousing duties at 5 p.m., travel to the railyard, pick up the containerized robots, and return them to the warehouse by about 8 p.m.

Treanor and Wyzgoski testified that a decision to change railyards was made in Japan; that Respondent had no input into the change of railyard pickup points; and that they now use David Thomason on container runs only on special request from General Motors that a particular robot is needed on an emergency basis. When there were no other drivers available, Wyzgoski directs Thomason to make the container run. The newly chosen railyard, they testified, operates only from 8 a.m. to 5 p.m., thus foreclosing the regular assignment to Thomason who works in the warehouse during such hours.

While President Treanor testified that the yard change occurred in October or November 1991 (Tr. 325) and Dispatcher Wyzgoski testified that the yard change occurred in early October 1991 (Tr. 485), President Treanor testified that Respondent transferred the container runs from Thomason to its local drivers as soon as Respondent was notified of the limited scope of the new railyard's hours (Tr. 327). In this regard, it should be noted that Thomason testified, on cross-examination, that he no longer made the container runs in late September or early October 1991 (Tr. 64) notwithstanding that his original testimony on direct examination, in response to the General Counsel's leading question, was that he ceased being assigned to the container runs ''after the union election'' (Tr. 36–37).

Discussion and Conclusions

(a) *The General Counsel's prima facie case*

The General Counsel proved a prima facie case (*animus*, *knowledge*, timing) of Respondent unlawfully removing Thomason from the lucrative container runs which he enjoyed for the year prior to the union election. By September, prior to removing Thomason, Respondent *knew* that Thomason was the Union's employee negotiator. Respondent, throughout the pre and postelection period, repeatedly told employees, in general, including Thomason, that Respondent, in short, despised the Union, urging them not to vote for the Union, warning them, unlawfully, that there would never be a contract between the Union and Respondent; unlawfully threatened them with less favorable treatment as a consequence of their having selected the Union; told them repeatedly that Respondent viewed the employees' vote for the Union as a ''stab in the back'' and that Respondent would ''stab them back''; and that Respondent, after the union election, would no longer permit the employees to get away with Respondent's lax enforcement of its policies, including its attendance policy.

In particular, in or about early October 1991, Respondent told Thomason (the conversation in which President Don Treanor and Dispatcher Tom Wyzgoski participated) that the employees were stupid for voting for the Union; and that they would never get a contract from Respondent. Wyzgoski added that Thomason had the most to lose by ''going through the Union'' (Tr. 24). When Thomason asked him what he meant by that remark, Wyzgoski said that Thomason had the most to lose because Thomason made the most money (Tr. 25). Finally, the container runs previously enjoyed by a known union supporter were given to two employees, Kunkle and Nurburger. Kunkle was explicitly antiunion and so informed President Treanor in September 1991, when President Treanor was ''poking around, trying to find out who voted for the Union'' (Tr. 27–28). Nurburger was not active in the support of the Union.

Thus, with respect to the elements comprising a prima facie case of Respondent having unlawfully removed Thomason from the container runs, there is credible, preponderant testimony that Respondent harbored great *animus* against the Union; and *knew* of Thomason's support of the Union and his unique selection as the union bargainer. Respondent, subsequent to the election, not only threatened its employees with reciprocating their ''stab in the back,' but also, in or about early October, precisely when Respondent removed him from the container runs, Wyzgoski told Thomason he had the most to lose from his support of the Union because he made the most money. In addition to this element of simultaneous *timing* of such an ominous admonition directed to Thomason, there is the fact that Respondent assigned the work to employee Kunkle, a known antiunion employee and to Nurburger, an employee who was, on this record, not active in the union drive, though there is no proof of Nurburger's attitude toward the Union.

In short, there are the elements of (1) union animus, (2) Respondent's knowledge of Thomason's prounion position, (3) the timing of the removal of container runs simultaneous with (4) Respondent's admonition and implied threat that Thomason had the most to lose from his support of the Union because he made the most money, and (5) its assignment of Thomason's container runs to antiunion Kunkle and indifferent Nurburger.

The defense: In response to the General Counsel's prima facie case of the discriminatory removal of the container runs from Thomason, Respondent may defend by rebutting the General Counsel's prima facie case, i.e., by showing the alleged discriminatee's union activity played no part in Respondent's allegedly discriminatory action. I discredit both President Treanor and Dispatcher Wyzgoski in their denials of union animus, knowledge, timing, and the other elements of the prima facie case. I credit the testimony of the General Counsel's witnesses on these points. I therefore conclude that Respondent has failed to rebut the evidence that Thomason's union activity was ''a motivating factor.'' in its removal of the container runs. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Southwest Merchandising Corp. v. NLRB*, 943 F.2d 1354 (D.C. Cir. 1991).

Under the Board's *Wright Line* doctrine (251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)), Respondent may also defend on the alternate ground that it would have taken the same action regardless of any protected activity engaged in by Thomason. *NKC of America, Inc*., 291 NLRB 683 (1988), citing *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400–401 (1983). Addressing, therefore, the second wing of Respondent's defense under *Wright Line*, Respondent bears the burden to prove, by a preponderance of the evidence, that it would have taken the same action against Thomason regardless of his known support of the Union, *Merillat Industries*, 307 NLRB 197 (1992).

While I have specifically discredited the testimony of President Treanor, particularly his denials of animns and of his having told employees that they had stabbed him in the back by their support of, and vote for, the Union, and of his denial that he told them that the Union would never get a contract from Respondent, I note that his testimony concerning the removal of container runs from Thomason was corroborated in greater detail by Dispatcher Wyzgoski. The essence of the defense, that the change in business operations of the Japanese producer of the robots, in turn, caused a change in the railyard used for the pick up of the containers. The new railyard had different, inappropriate operating hours, which prevented Respondent from continuing to use Thomason.

Wyzgoski nevertheless testified that in the period October 19 to December 1991 Thomason was allowed to leave work around 2:30 to 3 p.m. to do a container run and, indeed, even before that time, when Thomason was doing the container runs on a regular basis, he was allowed to leave work at 2:30 to 3 p.m. in order to do the runs. Wyzgoski testified that the timing of Thomason's departure would depend on how busy they were in the warehouse (Tr. 485). President Treanor's testimony, fairly read, demonstrates that the reason he no longer used Thomason on the container runs was because the new railyard junction was open only from 8 a.m. to 5 p.m. which necessarily conflicted with Thomason's warehouse hours of 8 a.m. to 5 p.m.

Thomason himself testified that his noral container runs occurred between 5 a.m. and 7:30 to 8 a.m. and 5 p.m. to 8 or 9 p.m. (Tr. 73). On the other hand, he credibly testified, without contradiction, that he performed container runs in the afternoon earlier than 4:30 p.m. and indeed performed container runs as early as 2:30 to 3 p.m. (Tr. 72). These departures would necessitate his leaving his warehouse job (Tr. 72). Furthermore, he testified that, on occasion, he ran the container runs ''all day'' (Tr. 72). In response to the question of how often he would commence his afternoon container run, not at warehouse quitting time or 5 p.m., but as early as 2:30 or 3 p.m. (during his actual warehouse working hours), Thomason testified that he did that ''a lot'' (Tr. 73). On these occasions, when Thomason left the warehouse before 5 p.m. and there was warehouse work still to be done, warehouseman Rodriguez regularly would perform Thomason's remaining work in the warehouse (Tr. 75). Thomason testified, without contradiction, that Rodriguez was an able warehouseman.

Weighing the evidence, I necessarily conclude that the General Counsel has established, on the basis of the factors listed above a strong prima facie case supporting a finding of the discriminatory removal of the container runs from Thomason: animus, retaliatory threats, the timing of his removal, simultaneous with Wyzgoski particularizing Thomason as having ''the most to lose'' because he save the most money, and awarding the container runs to antiunion or uncommitted employees. If it sought to ''stab'' Thomason, the surest way to retaliate against him (Respondent had just learned, that he had just been named as the Union's employee negotiator) was to remove him from the highly profitable container runs (which I calculate, on Thomason's testimony, as $60 per round trip; based on two round trips a day, equaling about $120 per day in addition to his wages as a warehouseman).

Respondent's defense, the mutually corroborative testimony of President Treanor and Dispatcher Wyzgoski, is, essentially, that Respondent had no control over the removal of the container runs because the change in railyards dictated that Thomason could no longer perform the job without sacrificing his work (8 a.m. to 5 p.m.) in the warehouse. Thus Respondent assigned the work to other unit employees (Kunkle and Nurburger). In support of this defense, there was only the testimony of Wyzgoski and Treanor, both of whom engaged in serious unfair labor practices, demonstrated union animus and particularly retaliatory motivation. In view of their having denied making such unlawful statements and my discrediting such denials, their testimony, the sole evidence in support of the above defense, takes on a questionable hue. In this respect, Respondent failed to support the Treanor and Wyzgoski testimony by corroboration in business records, communications, or witnesses to show that the railyard was indeed changed so that the container run pickups and deliveries could not occur except during Thomason's working hours. Nor did they, for instance, produce Nurburger and Runkle to describe the hours in which they actually performed the pickups and deliveries of the containers in the railyard. Nor did Respondent prove that business conditions in the warehouse, or elsewhere, could not continue to permit the deviations from the schedule it previously allowed: to have Thomason arrive late and leave early. More important, however, is Respondent's failure to demonstrate *when* the change in railyards occurred. In short, if Respondent removed the container runs from Thomason *before* the change in railyards, the entire defense based upon the change in railyard (and the change in railyard hours) would be eliminated. Thus, even granting the existence of a defense based upon a change in railyard and railyard hours, in view of my finding against the credibility of Wyzgoski and Treanor and their failure to corroborate the change in hours, and particularly the timing of the change in hours, I cannot regard the Wyzgoski and Treanor testimony as convincing evidence. I do not accord such testimony, standing alone, the weight I would have accorded it had it been corroborated by business records, the testimony of other employees (Nurburger and Kunkle) other witnesses or other corroboration.

Respondent, again, also failed to show why it did not continue to accommodate Thomason's continued engaging in the container runs with the change in railyard hours. It had previously continuously permitted the deviation. Indeed, Thomason was away from the warehouse all day on occasion and missed warehouse time ''a lot'' (Tr. 72–73). Although Thomason was employed for 9 or more years by Respondent

and apparently a valuable employee whom Respondent preferred to use on container runs (according to Wyzgoski's testimony), I am not at all suggesting that he be accorded special treatment in continuing the container runs at the expense of his warehouse work. Rather, I observe that Respondent appears to have departed from its established past practice of permitting Thomason to ''work around'' the hours of his regular warehouse schedule. This departure from past practice, I find, is explained by Respondent's contemporaneous discovery of Thomason having become a member of the Union's contract bargaining committee.

Under all the above circumstances, I am unable to give to Respondent's defense sufficient weight so that it qualifies for the Board standard of proof under the *Wright Line* defense: that it be established on proof of a preponderance of the credible evidence. *Merrillat Industries*, 307 NLRB 1301 (1992). Again, in the presence of the General Counsel's strong prima facie proof of unlawful motive in the retaliatory removal of Thomason's container runs, I am unable to conclude that it was more likely than not that Respondent removed the container runs because of the change in railyard hours regardless of Thomason's union activities. I therefore conclude that Respondent withdrew the container runs from Thomason, commencing late September or early October 1991, in violation of Section 8(a)(3) and (1) of the Act as alleged.[6]

(2) The alleged discriminatory reduction in workhours of Gary Gavette and Casey Stamps

(a) *Gary Gavette*

Gavette, employed for 3 years by Respondent and employed at the time he gave his testimony, has been at all material times a furniture loader and helper. Although he attended two or three union meetings, there is no evidence that he ever solicited other employees to join the Union, distributed union materials among employees at or near the jobsite or engaged in other union activities which might come to the notice of Respondent's supervisors. He never told any of Respondent's supervisors of his union sympathies. Apart from Thomason's testimony concerning President Treanor's ''poking around'' to determine who had joined the Union (and employee Ken Kunkle's open disavowal to President Treanor of having voted for the Union), there is no specific evidence of Respondent's knowledge of Gavette, or indeed Casey Stamps, having engaged in union activities or being sympathetic to or supporting the Union.

On the other hand, as above noted, Gavette testified, without contradiction that in August 1991, he was present in the dispatch office outisde the dispatch window which separated he dispatch area from the office area. On the other side of the dispatch window is the office area occupied principally by Dispatcher Wyzgoski. On this occasion, in August 1991, Gavette was standing immediately opposite the window separating him from the office in which President Don Treanor and Dispatcher Wyzgoski were present. Standing next to Gavette was employee Bill Pitts, upset because he had been recently demoted from driver to furniture helper. On this morning, Pitts asked President Treanor ''why his hours were being cut and *other employees'* hours were being cut?'' (emphasis added). According to Gavette's further uncontradicted testimony, President Treanor's response was: ''I don't have the work. You stabbed me in the back by voting for the union.'' President Treanor then turned around and walked out of the office (Tr. 139).[7]

Respondent defends generally on the assertion that Respondent has ''articulated a legitimate, non-discriminatory business reason for any reduction in employee hours, to wit: a marked decline in overall volume in business and a change in customer requirements'' (R. Br. 3). In support of this position, Respondent points to President Treanor's testimony concerning Respondent's down turn in business in 1992 relative to 1991 volume (Tr. 298). In particular, President Treanor testified that apparently for the first 4 months of 1991, business was comparable to that in 1990. Starting in June and going through October and November 1991, however, his long-distance moving business was down 31 percent from 1990 and his local moving business revenues were down 50 percent from 1990 (Tr. 298). In particular, he attributed the downturn in revenues to one of his four major customers, General Motors Robotics, starting in March 1991, demanding tbat Respondent bring down its cost and run the warehouse more efficiently. President Treanor denied that General Motors Robotics asked him to reduce his warehouse

[6] The complaint allegation dealing with violation of Sec. 8(a)(3) and (1) of the Act, par. 9, names employees but fails to specifically name David Thomason as an object of Respondent's discriminatory activity. Rather, the allegation is framed as a discriminatory reduction in work hours ''of certain unit employees *including, but not limited to* Ray Rodriguez, Gary Gavette and Casey Stamps.'' (Emphasis added.) The pleading puts Respondent on notice that the the General Counsel might well attempt to prove the unlawful reduction of work hours of other than namd employees. Together with Respondent's failure to demand particularization of the pleading (i.e., a Bill of Particulars) or to object to testimony regarding the reduction of Thomason's container runs and, indeed, Respondent's adducing considerable testimony in defense, I have made the above findings and conclusions on the theory that, without objection from Respondent, the matter had been fairly presented and thoroughly litigated. *Mine Workers District 29*, 308 NLRB 1155 (1992). In ultimately inferring an unlawful motive, I have also noted on the testimony of employee Gavette concerning the reduction of hours of employee Pitts, partly motivated as President Treanor stated, by the *employees* having stabbed Respondent in the back.

[7] As above noted, Dispatcher Wyzgoski later testified at length as a Respondent witness and was not questioned about his presence in the dispatch office when President Treanor made this remark to employee Pitts in the presence of Gavette. Gavette also testified to a further conversation between employees and President Treanor in later August 1991. That conversation related to President Treanor wearing a ''Grand Prix'' sweatshirt or T-shirt and the employees inquiring whether he had purchased such shirts for the employees. I found that in that conversation Treanor again accused the employees of having stabbed Respondent in the back by voting for the Union thereby voting out Respondent's sometime practice of purchasing lunches for the employees and voting out the ''family atmosphere'' in Respondent's work place. I have separately discredited President Treanor's denials of having used the expression ''stabbed me in the back'' in this and the prior conversation with Gavette. In any event, President Treanor, though testifying extensively with regard to this second, later August conversation involving the Grand Prix sweatshirt, did not deny the earlier August conversation with employee Pitts (in Gavette's presence). Thus Gavette's otherwise credible testimony on the earlier conversation, concerning the reduction of hours because the employees ''stabbed me in the back by bringing in the union,'' stands unrebutted.

rates (including labor, inventory control, etc.) that he had previously charged to that customer. As the General Counsel points out, Treanor did not explain how Respondent's increase of efficiency could reduce expenses for General Motors. Respondent submitted no documentation to support this testimony. The General Counsel did not object to its receipt.

In addition, although General Motors reduced ''dead'' (i.e., inactive) warehouse space in Respondent's warehouses by about 10,000 square feet, now occupying only 25,000 square feet of inactive space, there was no change in Respondent's billing for General Motors engaging active or ''live'' warehouse space. Respondent billed General Motors for the same 18,500 to 20,000 square feet in both 1991 and 1992 (Tr. 310).

Treanor testified that the revenues generated in the moving and storage business are cyclical, with 70 percent of revenues generated from mid-May through September and the period September through December being a slow period. President Treanor testified, however, that during past slowdowns, Respondent did not lay off employees or reduce employee hours (Tr. 387). Indeed, Wyzgoski testified that Respondent was busy in the summer of 1991 in its warehousing business (Tr. 486). Regardless of the seasonal September downturns, there was always cleanup work in the warehouses. Gavette, who, before the union election, worked 40 to 60 hours per week and only 10 to 20 hours a week after the election (Tr. 143), testified that Respondent, during slow periods in the moving and storage business, would ask its helpers, including Gavette, to work in Respondent's warehouses in order to add to their paychecks when their moving and storage earnings were low (Tr. 143–144). President Treanor told Gavette, before the Union was voted in, when Gavette's wages were low because of insufficient work in the moving end of the business, that there were ''a million things'' that Gavette could do in order to increase his earnings. In particular, he told Gavette to come into any of the warehouses or trailers ''any time you want'' and do cleanup work in the trailers and warehouses. Gavette testified without contradiction that there were four warehouses which Respondent owns and there was always work to be found in one of the four warehouses (Tr. 144).

(b) *Casey Stamps*

Similarly, employee Casey Stamps testified that he worked 30 to 40 hours before the election and only 4 to 13-1/2 hours after the election. Unlike the practice before the election, he no longer was assigned out-of-state jobs. He also discovered that subcontractor employees who, before the election, did only packing and did not do the furniture helpers' work of moving unboxed furniture, after the election, were both packing and moving unboxed furniture. Corroborating Gavette's testimony concerning furniture helpers working in the warehouse during slow periods, Stamps testified that before the election, if moving work was slow, he would be put to work in the warehouse uncrating robots, sweeping the floors, and moving the robots around. He also testified that other helpers would also be assigned to the warehouse, including Gavette, Anthony Brown, Ken Kunkle, Larry Decosta, and Wilbert Whiley. After the union election, this practice did not continue (Tr. 91–92). Rather, Respondent used the services of two newly hired employees to do the warehouse work normally performed by helpers.

Dispatcher Wyzgoski testified that in May or June 1991 Respondent hired Jeff Renno and Rich Masfern in the warehouses to assist Rodriguez and Thomason, the regular warehousemen. Masfern was hired to work at the Dixie Highway warehouse and Renno in the Walton Boulevard warehouse (Tr. 388–389). President Treanor told Stamps that they were hired as warehousemen (Tr. 92). They left Respondent's employ in September 1991 (Tr. 93) after working ''regular hours'' for the full period of their employment according to their timecards: 8 hours per day 5 days a week. Stamps saw the timecards (Tr. 96), and Respondent did not contradict his testimony.[8]

Discussion and Conclusions

The complaint alleges that, in violation of Section 8(a)(3) and (1) of the Act, Respondent unlawfully discriminated against employees Stamps and Gavette by reducing their hours because of their support of the Union and in retaliation for the Union's victory in the election (par. 9).

The General Counsel's Prima Facie Case

At the hearing, denying, in part, Respondent's motion to dismiss the discrimination allegations, I noted that it was undisputed that Respondent had knowledge of the prounion sympathies of Rodriguez and Thomason because Rodriguez was the union observer at the election and the Union informed Respondent that Thomason was its collective-bargaining negotiator. With regard to the alleged discrimination against Stamps and Gavette, however, I reserved decision, observing that there was no testimony or other evidence demonstrating Respondent's *knowledge* of their prounion sympathies or activities. I reserved decision as to them in order to permit the General Counsel to argue, as best she could, that an inference of knowledge existed under a ''small plant'' theory or some other theory to impute to Respondent knowledge of Stamps and Gavette's union sympathies.

Consistent with the above discussion at the hearing, the briefs of the parties refer to the ''small plant'' theory of imputing knowledge to Respondent; the General Counsel urging its affirmative application; Respondent against.

A review of the record, however, demonstrates that proof of *knowledge* is unnecessary in the circumstances in this case. The undenied and credited testimony of Gary Gavette, presently employed by Respondent at the time he gave his testimony, was that in August 1991, in response to employee Bill Pitts' question concerning why Pitts' and *other employees'* hours (Tr. 139) were being cut, President Treanor answered: ''I don't have the work. You stabbed me in the back by voting for the union'' (Tr. 139).

Proof of Respondent's knowledge of an employee's union activities is necessary only to prove that a particular employer engaged in certain discriminatory action with *knowledge* of the particular employee's union activities. This permits the inference that the subsequent employer discriminatory action was in retaliation against the employee engaging in union activities. Thus, ordinarily, proof of knowledge is a requisite element in proof of a discriminatory *motive*. In the instant case, the reason that proof of Respondent's

[8] Since neither party produced the payroll records of Masfern and Renno, it is unknown whether they were hired before or after the Union's petition for certification was filed on May 29, 1991.

''knowledge'' is unnecessary is that the actual motive for Respondent's cutting of Gavette's and Stamps' hours was made explicit by President Treanor's response to Pitts: ''I don't have the work. You stabbed me in the back by voting for the union.'' Once the employer, here Respondent, explicitly reveals a discriminatory motive for his action (''a . . . motivating factor,'' *NLRB v. National Transportation Management Corp*., 462 U.S. 393, 400–401 (1983)) against its employees, generally, it is unnecessary for the General Counsel, in proving a prima facie case, to prove the employer's knowledge of a specific employee's union sympathies or activities. *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 340 (8th Cir. 1986), and cases cited therein; *Majestic Molded Products v. NLRB*, 330 F.2d 603 (2d Cir. 1964); *Rosen Sanitary Wiping Cloth Co*., 154 NLRB 1185, 1187 (1965), and cases cited in footnote 2.

In short, President Treanor's response to employee Pitts, above, concerning the questioned reduction of hours of ''other employees'' creates a prima facie case: that at least one of the two reasons for Respondent's cutting the work hours of employees like Stamps and Gavette was unit employees' having stabbed Respondent in the back by voting in the Union. At best, the other reason advanced by President Treanor, that Respondent ''didn't have the work'' presents a ''dual motive'' basis for Respondent's discriminatory conduct in cutting its employees' work hours. Under the *Wright Line* doctrine, as interpreted by the Supreme Court in *NLRB v. Transportation Management Corp*., supra, the burden of proof is on Respondent to prove, by a preponderance of the evidence, that it would have cut the hours because of a lack of work regardless of the employees having stabbed Respondent in the back by bringing in the Union. *NKC of America*, 291 NLRB 683 fn. 4 (1988), citing *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400–401 (1983); *Edward's Restaurant*, 305 NLRB 1097 (1991).

With regard to Respondent's defense, that lack of work caused the reduction in employee hours, the following facts are pertinent: (1) Respondent offered no documentary evidence to show that there was a lack of work for its furniture mover-helpers or that business (volume) had actually slipped; there is only the testimony of President Treanor; (2) in the face of Respondent's historical use of helpers to work in the warehouse to augment their hours and thereby raise their wages, Respondent, offering no explanation, commencing after the union election, refused to permit its furniture mover-helpers to follow this historical augmentation of wages and, at the same time, substituted two newly hired temporary employees (Renno and Wasfern) who worked 5 days per week, 8 hours per day in the warehouse; (3) at the time they were working in the warehouse, Dispatcher Wyzgoski testified that business was ''up'' (Tr. 486) and these ''summer help'' employees did not leave until September 1991 when they returned to school; and (4) President Treanor testified that in the course of Respondent's business, it has never laid off or cut the hours of employees during periodic downturns of business (Tr. 387). In *Kenosha Auto Transport Corp*., 302 NLRB 888 (1991), the Board found unlawful the layoff of an employee, (1) as here, against a background of unlawful threats, (2) where as here, the layoff (reduction in hours) occurred in the month after the union certification; (3) where, as here, regardless of a contention that work was at a seasonal low, the employer had historically not laid off workers during seasonal slowdowns; and (4) where, as here, the employer hired employees to perform the work which the laid-off employees had performed. Thus, where, as here, Respondent hires employees to perform warehouse work and forbids its helpers to perform the erstwhile warehouse work they ordinarily performed to augment their incomes; where Wyzgoski testified that business was good in the summer of 1991 or else he would not have hired the new employees; and where Respondent historically has never laid off or cut hours of employees due to a seasonal business downturn, I am unable to conclude that Respondent, o consistent with its *Wright Line* obligation, has proved by a preponderance of the evidence that it would have cut the hours of Stamps and Gavette wholly apart from Treanor's simultaneous statement that the August 1991 cut in hours was due to the employees voting in the Union (July 12, 1991), and ''stabbing'' Respondent in the back. I therefore conclude that, as alleged, Respondent reduced the work hours of its employees Gary Gavette and Casey Stamps, commencing after July 12, 1991, in violation of Section 8(a)(3) of the Act because of, and following, the Union's victory in the July 12, 1991 election.

(c) *Ray Rodriguez*

The same paragraph of the consolidated complaint (par. 9), alleges that, along with employees Gavette and Stamps, Respondent reduced employee Ray Rodriguez' hours because of his activities in behalf of the Union and because of the Union's election victory.

Rodriguez appeared at the July 12 Board-conducted election as the Union's observer. I conclude, on the basis of the entire record, including Treanor's statement to Rodriguez, below, that Respondent perceived Rodriguez as a prounion employee.

On September 16, 1991, Rodriguez entered the dispatch office at about 8:15 a.m. to get a cup of coffee and there found employees Wiley, Pitts, and Anthony Brown along with President Treanor. Although the employees were apparently in conversation with Treanor, Rodriguez heard nothing of the substance of the conversation but, upon Rodriguez turning to leave, President Treanor told him (Tr. 175–176): ''that goes for you, too, Ray Rodriguez, fuck you and the union because . . . I'm not coming to no agreement and no contract . . . you guys stabbed me in the back and I'm going to stab back.'' Rodriguez returned to the warehouse.

In the warehouse, as the assistant to Dave Thomason, he regularly reported for work at 7:30 a.m. and emptied trash cans in the front offices; used the office copy machine to make copies of paperwork; swept the floors; and uncrated robots from their metal crates. After the union election, there is no dispute that Rodriguez was forbidden to enter the company offices to clean up; was restricted to the warehouse (Tr. 180), no longer used the copy machine to do paperwork but submitted papers to Dispatcher Wyzgoski for copying (Tr. 181), and had his hours reduced from about 42-1/2 hours per week to no more than 40 hours per week (Tr. 181). This reduction apparently coincided with President Treanor's above September 16 statement directly to Rodriguez since Rodriguez places the reduction of workweek hours as commencing about a month and a half after the July 12 election (Tr. 181).

Like the testimony of employees Stamps and Gavette, Rodriguez testified that after the union election the furniture helper employees were no longer permitted to work in the warehouse (Tr. 181–182). He also noticed that after the union election Dispatcher Wyzgoski ran the warehouse rather than Rodriguez in Thomason's absence (Tr. 182). When Thomason was absent from the warehouse, Wyzgoski worked in the warehouse taking over Thomason's duties.

Respondent's Defense

Although President Treanor admitted that Rodriguez and Stamps are still working for Respondent, he denied telling Rodriguez that he accused the employees of having stabbed him in the back and that he would stab them back in return (Tr. 347). With regard to whether he told Rodriguez ''fuck you and the Union and that goes for you too, Ray Rodriguez,'' President Treanor testified that he could not recall having made such a statement (Tr. 347). I credit Rodriguez with regard to both Treanor statements which (a) appear to further identify Rodriguez with the Union; and (b) tend to exhibit Respondent's union animus against Rodriguez.

With regard to why Rodriguez is not employed in the warehouse on a regular basis and has been assigned to a furniture moving crew, President Treanor testified that he's not in the warehouse because he's not needed (Tr. 319). Treanor testified that David Thomason, alone, is working in the warehouse and he alone can handle the warehouse business which has declined because the General Motors Fanec business is down and the activity in the warehouse is down (Tr. 319).

It is essentially unnecessary to repeat the testimony of employees Stamps and Gavette, above. In short, Respondent never cut the hours of employees during economic downturns; and historically permitted Rodriguez to perform janitorial, crate handling, photostating, and other custodial functions in order to increase his hours from 40 to 42 hours per week. There is no explanation on this record why he was no longer permitted to enter the administrative offices or to perform these supplementary functions. As in the case of the furniture helper-movers, who were historically permitted to work in the warehouses, I am not persuaded that Respondent has proven an economic defense as to why Rodriguez, like Stamps and Gavette, was not permitted to clean up warehouses in order to maintain or augment work hours. As the proof, below, will show, Dispatcher Wyzgoski worked in the warehouse on a number of occasions for considerable periods of time doing ordinary warehouse work when Rodriguez could have been employed.[9] Although the exact contour of how many hours of work Rodriguez missed may be left for supplementary, compliance proceedings, it is enough here to note that, after certification of the Union, Dispatcher Wyzgoski, a nonunit employee, without notice to the Union, was performing Rodriguez' work in the warehouse in the absence of Thomason, or even in the presence of Thomason, when Rodriguez could have been employed in doing so. In short, I do not believe that Respondent, by a preponderance of the evidence (it has failed to submit documentary evidence to demonstrate not only that its General Motors business had fallen but that the business of its three other principal customers was sufficiently down as to preclude the need for Rodriguez' services) has successfully shouldered its burden to prove that Respondent failed to use Rodriguez in the warehouse, regardless of his union activities, because of a downturn in business. In this regard, I am not referring to Dispatcher Wyzgoski performing warehouse functions when all employees are out to lunch and his warehouse functions are limited to 10 or 15 minutes in the unloading of a truck. I conclude that Respondent both reduced Rodriguez' hours in the warehouse and refused to permit him to perform supplementary custodial functions commencing after the union election, in violation of Section 8(a)(3) and (1) of the Act, as alleged, in retaliation for Rodriguez identification as a union supporter and the Union's election's victory on July 12, 1991, consistent with Respondent's threat to ''stab the employees back'' for their having brought the Union in.

G. *Further Alleged Violations of Section 8(a)(3) Retaliatory Changes in Company Policy Regarding Employee Parking, Telephone Use, Access to the Warehouse, and the Administrative Portion of Respondent's Office*

The consolidated complaint further alleges that on or about August 15, 1991, President Treanor changed Respondent's policies regarding employee parking, telephone use, and access to the warehouse administrative portions of the office because of unlawful motivation (par. 10).

It is undisputed that Respondent's ''Company Policies'' (G.C. Exh. 2) have been in effect since September 1988. Although Respondent began its operations in the present corporate form on or about February 10, 1990, Respondent took over from the predecessor employer the same employees and their terms and conditions of employment. This included ''Company Policies.''

As above noted, the election was held on July 12 and the Board certified the Union as the statutory representative of Respondent's unit employees on July 22, 1991.

In August 1991, President Treanor told employees Pitts and Gavette that Respondent's employees had stabbed him in the back for voting for the Union (Tr. 139); and in a further August conversation, relating to Grand Prix T-shirts, told assembled employees that ''when you guys voted the union in, you voted out stuff like this [receiving Grand Prix sweat shirts and free lunches]. You guys stabbed me in the back. I am going to stab you in the back. No more family atmosphere around here, things are going to change'' (Tr. 140).

Thus, August 15, 1991, around the time of the above baleful statements, Respondent issued a memorandum to its hourly [union] employees regarding changes in the enforcement of company policy effective August 19, 1991 (G.C. Exh. 2):

TO: Hourly Employees

RE: Company Policy

[9] With regard to Rodriguez' not working at the warehouse, for the period November 18 through December 7, 1991, Thomason was out of work because of an eye injury. During this period, the warehouse work was performed by Vice President Rich Treanor and Dispatcher Wyzgoski, both nonunit. This is the work that was normally performed by Thomason and Rodriguez or other unit employees (Tr. 42–43, 59, 69). In the Christmas week, while Thomason was on vacation, Wyzgoski and not Rodriguez performed warehouse functions (Tr. 43, 182). (See G.C. Exhs. 15 through 24). As will be seen hereafter, the period of Rodriguez' 30-day suspension is immaterial since the suspension itself was unlawful.

Please be notified of policy enforcement [sic] as of August 19, 1991, they are as follow [sic].

1) Designated parking for hourly employees is along east side of the building starting at the dispatch door and proceeding to the back fence. When that area is completely utilized, you may then and only then park in the newly constructed area. When that area is completely utilized, you may then and only then park in the parking spots near the sidewalk near the front dock doors. Your cooperation is appreciated in using our parking areas efficiently.

2) It has been brought to my attention that from time to time hourly employees are wandering through the administrative portion of the office for things like change, copy's, pens, etc. You are authorized to be in the drivers dispatch areas only. If you need to meet with the administrative staff, please make an appointment through Tom who will schedule a meeting. For those of you who's job function it is to meet with the administrative and management staff regularly as part of your daily job function, (Dave T. & Rick K.) I will be discussing the procedure with you individually. drivers needing to turn in paperwork to the administrative staff can do so through Tom or leave with Jim. The administrative portion of the office begins with the door entering Sue and Jim's area. Please use the side door for entry and exit to the building.

3) If you are not suppose [sic] to be in the warehouse—don't be there. You are not authorized. This policy will be strictly enforced by Management.

4) Telephones are for business use only. Employees are encouraged to use public phones for all personal calls. In emergency situations, please notify Tom, Rich, Jim or myself for authorization to use company telephones.

The suggestion box is open for any reasonable suggestions on how to make the drivers area more comfortable and functional for you.

As always, if you would like to speak to me directly, I will always make myself available.

Don Treanor

(1) Automobile parking

Prior to the election, employees were allowed to park their cars anywhere on Respondent's property (Tr. 30; 142). After the issuance of the above August 5 memorandum (G.C. Exh. 2), President Treanor told employee David Thomason that the employees no longer could park in front of Respondent's warehouse but had to park alongside the building. There are only four parking spots alongside the building. If employees are unable to secure one of the four spots, they are in practice required to park across the street in the Kentucky Fried Chicken parking lot (Tr. 31). Employees avoid parking their cars in other available Respondent areas because trailer trucks delivering goods to the warehouse throw rocks, striking the cars and also get their automobiles dusty. The employees thus parked at the Kentucky Fried Chicken lot (Tr. 157).

Respondent, in President Treanor's testimony, defended the charge by explaining that his car had been damaged in a collision with his sister's car in Respondent's parking lot in late July 1991. He said he decided the change was needed to avoid further such accidents (R. Br. 7; Tr. 411–415).

Discussion and Conclusions

The above August 15 memorandum, placing restrictions on its employees' ability to park near the warehouse, was issued contemporaneously, if not simultaneously, with Respondent's admonition that it would stab the employees back for having brought the Union in. That this constitutes a prima facie case of retaliation needs no further explanation and I find that the the General Counsel has proved, as a prima facie matter, that Respondent has discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act, as alleged, by a retaliatory change in their parking privileges. Parking is now more remote from the usual parking areas and, on the uncontradicted evidence, may put employee vehicles in jeopardy from rocks thrown up by visiting trailer trucks and by the dust deposited on their cars.

Respondent's defense is that it sought to avoid further accidents by changing and restricting employees' parking privileges because President Treanor's sister's car damaged his car. The best that can be said of such a defense is that it appears to be a significantly unconvincing non sequitur. It was explained neither at the hearing nor in the brief why damage caused by President Treanor's sister's car striking his car should cause Respondent to restrict its *employees* erstwhile parking privileges. In short, I conclude that the new parking restriction was merely President Treanor's ''stab back''—an irritating retaliatory act contemporaneous with repeated August 1991 admonitions to his unit employees that he would ''stab them back'' for bringing in the Union.

(2) Restrictions on the use of the telephone

Before the election, employees were allowed to use Respondent's dispatch room telephone any time they wanted (Tr. 31; 142). After issuance of the above memorandum, the employees, in practice, were forbidden to use the phone and had to make their phone calls across the street in the Kentucky Fried Chicken or from a nearby gas station (Tr. 143). Previously, the employees would be paged for incoming calls while they were working in the warehouse (Tr. 177–178); but after the election, they were no longer paged; Respondent merely placed their names up on the bulletin board notifying them that there had been a telephone call for them. The employees would then be obliged to return the phone call at the lunchbreak or after work, but not from the in-house phone.

As above noted, the Respondent's August memorandum notifies the employees that the telephones are ''for business use only.'' The use of Respondent's telephones, according to memorandum, is ''in emergency situations'' (G.C. Exh. 2).

In defense, Dispatcher Wyzgoski testified that the practice had not changed with the election. He testified he has never denied a request to use the dispatch area phone. He gave as an illustration the fact that in the week immediately prior to the hearing he told Dave Thomason that his wife had called and that he had relayed his wife's message to Thomason in order to have Thomason make a return phone call from the dispatch office phone.

Respondent defends by asserting that its change in telephone use policy was in response to a sudden increase in the number of long-distance calls placed by unit employees from

company phones. Though advised that Respondent's telephone bills would be better evidence of the upsurge, President Treanor failed to produce the telephone bills (Tr. 353–355).

Discussion and Conclusions

There can be no dispute that the General Counsel proved a prima facie case in that the telephone in the dispatch office was freely available and used without restriction before the election and, with the August 15, 1991 memorandum, employees were told that the dispatch office phone was for business use only and no longer for their personal calls. This change in an existing employment practice, like the change in car parking, was also contemporaneous with Respondent's admonition to employees that it would ''stab them back'' for bringing in the Union.

The General Counsel's witnesses testified that as a matter of *practice* they were forbidden to use the dispatch office phone and a new system of notes, rather than paging, had been instituted. The fact that Wyzgoski, on one occasion, after issuance of the General Counsel's complaint, apparently permitted Dave Thomason to use the phone for a personal purpose, and even paged him, does not mitigate the new unitwide practice of forbidding employees to use the dispatch office phone for personal calls on a free and open basis.

To the extent Respondent defends on the assertion that there was a sudden upsurge in unauthorized long-distance calls by its hourly employees from company phones, that defense necessarily is unpersuasive. (1) Respondent failed to adduce the best evidence to support its assertion (its own telephone bills); (2) President Treanor testified (Tr. 354–355) that the ''abuse'' had been going on for a time predating the Union's organizational campaign; and (3) the timing of the new rule simultaneous with statements of retaliatory intent.

I conclude, as with the change in the employees' parking privileges, that the institution of a new restrictive telephone rule was retaliatory (get rid of the ''family atmosphere'') and discriminatory within the meaning of Section 8(a)(1) and (3) of the Act as alleged. Respondent advanced no persuasive business reason or preponderantly proved that it took these actions regardless of its union animus. See *Outboard Marine Corp.*, 307 NLRB 1333 (1992).

(3) Employee access to the warehouse and to the administrative portion of the dispatch office

Paragraph 10 of the consolidated complaint also alleges, as unlawful discrimination, under Respondent's August 15 memorandum, the new restriction on employee access to the warehouse and the administrative offices.[10]

In paragraph 2 of the August 15, 1991 memo describing changes in enforcement of ''company policy,'' President Treanor declares his opposition to hourly employees ''wandering through the administrative portion of the office'' and declares that the hourly employees are authorized to be in the drivers dispatch area only. Hourly employees turning in paper work in the office must give the papers to Wyzgoski or to ''Jim.'' The hourly employees are now forbidden to be in the offices and President Treanor reminds them, in the memorandum, that the ''administrative portion of the office begins with a door entering Sue and Jim's area. Please use the side door for entry and exit to the building.''

Prior to the issuance of this August 1991 memorandum, warehouseman Thomason was responsible for the whereabouts of merchandise entering or leaving the warehouse. In executing this function he spent part of his workday in the front office (the administrative office) using its telephone, copying machine, fax machine, and computer. Similarly, before the election, assistant warehouseman Rodriguez was free to enter the administrative office to process his paperwork, using the copying machine. After the union election, with the issuance of the memorandum, Rodriguez was neither permitted to clean up the offices (thereby augmenting his hours of work and gross pay) nor allowed into the office to process his paperwork. Rather, he was required to turn in his paper work to Wyzgoski in the dispatch office for processing (Tr. 181).

Similarly, apparently in support of paragraph 3 of the memorandum (restricting employee presence in the warehouse), Respondent no longer assigned furniture helpers to the warehouse when extra warehouse help was needed. The evidence is undenied that helpers would be assigned to the warehouse prior to the union election in order to perform warehouse functions and to increase their hours of work and thus their gross pay (Tr. 34, 91–92). After issuance of the memorandum, Respondent's policy on the use of nonwarehouse employees coming into the warehouse changed. Both President Treanor and Dispatcher Wyzgoski told warehousemen Thomason that no one was allowed in the warehouse unless he had been sent there by Wyzgoski or Treanor. Apparently after the election, Respondent hired two summertime employees, Jeff Renno and Rick Masfern to perform warehouse work in place of the furniture movers who had previously performed the work prior to the election. These two summer employees worked full 40-hour weeks until their employment ceased in September 1991 when they returned to school.

The change, forbidding nonwarehouse employees to work in the warehouse to supplement their incomes, was also contemporaneous with the hiring of the two summer employees and consistent with Respondent's admonition that it would ''stab'' the employees' back in retaliation for their having brought in the Union. This retaliation cost the nonwarehouse employees hours of work and changed their wages to their detriment. This change, I conclude, was unlawful and discriminatory and violated Section 8(a)(3) and (1) of the Act as alleged with regard to both forbidding Rodriguez and Thomason into the administrative office to perform their work (and increase their hours, and forbidding nonwarehouse employees into the warehouse to supplement their hours of work and increase their income.

H. *Further Violation of Section 8(a)(3)*

The October 10, 1991 Change in Respondent's Policy and Practice Regarding Enforcement of its Attendance Policy

(1) Background

Respondent's policy with regard to employee lateness appears in its September 29, 1988 memorandum entitled

[10] Unlike the issue of ''parking,'' Respondent's brief fails to comment on the new, August restrictions on use of the telephone and access to the warehouse and administrative offices.

''Company Policies'' (G.C. Exh. 3),[11] Dispatcher Wyzgoski testified that Respondent's lateness policy requires that an employee, anticipating lateness, must call the operations manager (Wyzgoski) and declare the time that the employee will arrive and how late the employee expects to be (Tr. 427). Wyzgoski admitted that there is nothing in the policy regarding the time when the late employee must call him with regard to the employee's scheduled starting time (Tr. 427).

Warehouse employee David Thomason testified that before the election employees would come to work late without discipline, but after the election the company's attendance policy changed (Tr. 48–49). Indeed, more than a year before the election, Thomason had a conversation with Dispatcher Wyzgoski about the company attendance policy. According to Thomason's uncontradicted and credited testimony, Wyzgoski told him that if he came in late, ''it was not a big deal as long as you came in. . . . The only thing that a no-show means is if you did not call in or did not come to work. If you don't call or you don't show'' (Tr. 47). Thomason further testified, without contradiction, that Wyzgoski told them that he ''didn't care if I came in an hour late or not; as long as I came to work, it wasn't a no-show'' (Tr. 47).

(2) Treatment of employees Stamps and Gavette

Employee Stamps testified that before the union election, he called in late on a couple of occasions and was not disciplined (Tr. 99–100). On November 9, 1991, however, he called in about a half hour late and told Wyzgoski that he was on his way in. Wyzgoski told him to stay home; that he did not need him and Stamps received discipline of a couple of days off for such late calling in (Tr. 99; 120–121).

Although employee Gavette arrived late for work 10 or 12 times prior to the union election and was never disciplined for it, he was disciplined once for a ''no-show'' in 1990. After the union election, Gavette telephoned in late at 9:30 a.m. and told Wyzgoski that he wanted the address of the jobsite in order to come to work. Wyzgoski answered that Respondent covered his job for the day and directed Gavette to call him back. When he did so, Gavette received a 30-day suspension.

(3) Treatment of new hire Steve Greenwood in 1992

On the other hand, Gavette testified concerning discipline, or the lack of discipline, accorded to other employees after the union election. These employees showed up late for work and were not disciplined. With Ken Kunkle being the driver on a June 29, 1992 job, starting at 4 a.m., a new employee, Greenwood, was 3 hours late and received no discipline. On another occasion, on July 3, 1992, again Greenwood was 1 hour late. Employees Gavette and Pitts waited for him. Greenwood received no immediate discipline, went out on the job, and worked without discipline during the entire following week (Tr. 148–149).

Dispatcher Wyzgoski testified that Greenwood was a new hire and indeed was 3 hours late on June 29 for which he received only an oral warning. Wyzgoski did not at that time tell him of Respondent's strict policy against no-shows and the failure to call in (Tr. 459). With regard to this 3-hour lateness on June 29, Wyzgoski testified that he could not recall if Greenwood merely called in late or just came in late (Tr. 462), but Wyzgoski was very upset (Tr. 463). Wyzgoski, however, could not explain why he failed to tell Greenwood, at any time, that if he was a no-show on a third occasion, he would be violating Respondent's very strict no-show policy and would be fired. His explanation was that he ''probably should have'' but did not; and he finally testified that he could not remember why he did not so inform Greenwood but asserted that Respondent was very busy at the time (Tr. 463).

(4) Treatment of employee Ray Rodriguez 3 months after the election

On October 9, 1991, at about 2 to 3 p.m., Rodriguez telephoned Wyzgoski and told him only that he would be in to see him later. Rodriguez thereafter appeared and spoke with Wyzgoski and President Treanor. Although he had been scheduled to work that day, Rodriguez did not work that day but, at the meeting, told Treanor and Wyzgoski that he was on his way out of town because of personal problems. Rodriguez told Wyzgoski that he did not call him earlier in the day because he did not care about anything (Tr. 441). Rodriguez said that Wyzgoski told him that he would see Rodriguez on the next workday.

On the next workday, Wyzgoski told Rodriguez of Respondent's attendance policy against no-shows culminating in termination, that Rodriguez was a ''no-show'' for failing to show up, and that he had no choice but to give him the week off as discipline. According to Rodriguez' uncontradicted and credited testimony, Wyzgoski then told him: ''we used to let you guys get away with this kind of stuff. But now you are union and you guys are playing your game and the company is going to have to play by their game . . . you play by your rules, we play by ours'' (Tr. 190–191).

Thereafter, Rodriguez was scheduled to work at 7:30 a.m., Saturday, November 16, 1991. Having worked 17-1/2 hours on Friday, November 15, Rodriguez failed to report for work as scheduled on Saturday, November 16, but instead, telephoned Respondent at 8:15 a.m. on that day, almost an hour after starting time.

On this Saturday morning, employee Chuck Nurburger answered the phone (Tr. 194), and Rodriguez told him that he had only awakened 15 minutes prior to the call and was on

[11] In pertinent part, the ''company policies'' relating to employee lateness are:

> (h) a phone call to the operations manager will be required when an employee is unable to report to work by the reporting hour.
>
> (i) The words ''no show'' shall appear under the heading job description when an employee neither reports to work nor contacts the operations manager. No shows are considered highly irresponsible and shall be penalized in the following manner:
>
> (1) First occurrence—one week off without pay.
>
> (2) Second occurrence (same year—one month off without pay).
>
> (3) Third occurrence—termination from Treanor Moving and Storage Co.
>
> . . . .
>
> No show shall remain on an employees' record for a period of one (1) year from the date of the occurrence.

his way to work. Nurburger told him that the truck had already left and that somebody had taken his place (Tr. 195). When Rodriguez said that he was going to drive straight to the jobsite because he knew where it was, Nurburger told him not to do that because he had been already replaced for that day's work (Tr. 195).

Rodriguez reported for work on the following Monday, November 18, and found employee Chuck Nurburger in the dispatch office. Nurburger told him not to punch in because President Treanor wanted to talk to him. Rodriguez waited in the dispatch office for about 1-1/2 to 2 hours before Treanor asked him into his office (Tr. 195). While Rodriguez was waiting in the dispatch office, Nurburger told him (Tr. 211) that President Treanor had been standing along side of Nurburger when Rodriguez had telephoned on the previous Saturday morning and Treanor was telling Nurburger what to say on the phone concerning the fact that the truck had already left. (Tr. 197.) When Rodriguez thereafter told this to Treanor in the office, Treanor denied being at Nurburger's elbow during the phone call (Tr. 198).

In any event, when Rodriguez entered, he found both President Treanor and his brother, Vice President Rich Treanor (who did not testify in this proceeding), in the office. President Treanor handed Rodriguez a reprimand (G.C. Exh. 6) and told him that this was already his third or fourth lateness. Rodriguez denied that it was and said it was only his second lateness (Tr. 196). President Treanor reaffirmed that it was not merely a second lateness; told Rodriguez that he was supposed to have been ready for work at 7:30 a.m. on Saturday morning (November 16) and that he had not showed up until 8:15 a.m. President Treanor said that this was a ''no-show'' (Tr. 197). At this point, Rodriguez told the Treanors that Dispatcher Wyzgoski told him, at the time Rodriguez previously received a week off discipline for being late, that Respondent would no longer permit the employees to get away with stuff that they had gotten away with before (Tr. 198). President Treanor answered (Tr. 198–199) that: ''you guys are union, we can't help you no more. We use to let you get away with stuff like this, not no more'' (Tr. 198–199).

As above noted, Rodriguez testified that before the election he had called in late about a dozen times and had never been reprimanded or disciplined. Neither President Don Treanor nor Dispatcher Wyzgoski, both appearing later as Respondent's witnesses, denied Rodriguez' testimony that both of them told him that because of the advent of the Union, Respondent could no longer help them and would not let them get away with ''stuff like this . . . not no more'' (Tr. 199). Again, Vice President Treanor, though present at the conversation, was not called by Respondent.

Discussion and Conclusions

Against the background of President Treanor's uninhibited union animus (''stab you in the back''; never get a union contract, etc.) I may not simply discredit Rodriguez' somewhat repetitious but uncontradicted and otherwise credible testimony that both Dispatcher Wyzgoski and President Treanor explicitly told him, both in October and November 1991, that Respondent would no longer let the employees, because of the unit support of the Union, get away with calling in late without discipline. These statements, also made in the presence of Vice President Rich Treanor, who was not called to testify or to contradict this testimony, is an explicit statement of unlawful, generalized, retaliatory motivation in the *enforcement* of Respondent's work rule against calling in late and the ensuing discipline. It should be noted that the complaint does not allege, nor does the General Counsel urge a finding, that Respondent changed its work rules concerning no-shows or calling in late; rather, that Respondent, unlawfully and with a discriminatory motive, changed enforcement of the rule because of the advent of the Union. The disparate harsh treatment accorded union supporters (Gavette and Stamps) compared to new hire Greenwood, a repeat—violator, is glaring. Wyzgoski's inability to explain his leniency to Greenwood requires no comment. I conclude that Respondent, as alleged, violated Section 8(a)(3) and (1) of the Act by changing its policy and practice[12] regarding *enforcement* of its attendance policy, all because of, and in retaliation against the Union's being certified as the collective-bargaining agent of Respondent's hourly employees. Employees Rodriguez (November 18 for 30 days), Stamps (November 9, 2 or more days), and Gavette (30 days' suspension after election) suffered disciplinary layoffs pursuant thereto and must be made whole. See generally *Mid-South Bottling Co*., 287 NLRB 1333 (1988), enfd. 876 F.2d 458 (5th Cir. 1989).

I. *Alleged Violation of Section 8(a)(5)*

(1) Change of company policy regarding employees remaining on the premises after punching out

Prior to the election, employees remained on premises after punching out. Respondent never advised employees that it was against company policy to remain on Respondent's premises after punching out.

On or about January 3, 1992, Respondent issued a further memorandum entitled ''Company Policy'' (G.C. Exh. 4). This memorandum refers to an existing company policy directing the immediate termination of any employee involved in the unauthorized sale or theft of property belonging to or in the possession of Respondent. The memorandum advises employees of other violations or company policy: (1) drinking on the job; (2) remaining on the premises after punching out. After the election, the employees were told that as soon as they punched out, they were required to leave Respondent's property (Tr. 46).

President Treanor, in defense of this Respondent action, testified that the memorandum was issued because Respondent discovered that some of its customers' scrap material from the warehouse was being removed by an employee and sold (Tr. 382–384). President Treanor testified that he issued the January 3 memorandum (G.C. Exh. 4) requiring departure after punching out as part of the mechanism to prevent theft of material on Respondent's premises (Tr. 384). and that he did not notify the Union of this change because he was not aware that he was obliged to notify the Union (Tr. 384). Respondent's defense to the new restriction on ''after hours access to the business premises'' was that Respondent

[12] Respondent cites *Postal Service*, 275 NLRB 360 (1985), as a defense. That case is distinguishable since there the employer repeatedly enforced its time limits on ''rest breaks''—a lawful rule—in a ''uniform, manner.'' In the instant case, the rule was enforced for discriminatory purposes, with expressly disparate treatment, based on Respondent's retaliatory desires.

demonstrated a legitimate, nondiscriminatory reason for this action (R. Br. 7).

Discussions and Conclusions

Although one may argue whether there is a necessary correlation between the employee who allegedly stole the copper scrap (an activity already forbidden in the Respondent's company manual) and employees remaining on Respondent's premises after hours, Respondent's defense (''legitimate nondiscriminatory reason'') is simply not a defense to the alleged violation of Section 8(a)(5) of the Act. There is no allegation that this Respondent change of policy violates Section 8(a)(3) of the Act; and therefore Respondent's suggestion that the change was nondiscriminatory misses the mark. The question, as noted at the hearing (Tr. 384), was only whether the change was made without notice to or an opportunity to bargain with the Union. There was no defense—much less proof—of an emergency condition, i.e., other thefts or vandalism, which obviated Respondent's obligation of prior notice to the Union.

I conclude that the employees' preexisting right or privilege of remaining on Respondent's premises after punching out, whether to talk about work or to wait for transportation, was a mandatory subject of bargaining and a term and condition of their employment. After the Board-conducted election, and certainly after July 22, 1991 certification, Respondent's January 3, 1992 memorandum, occurring after both events, requiring employees to leave the premises after punching out, necessarily changed this term and condition of employment. Section 8(a)(5) of the Act requires that before an employer changes or modifies the unit's terms and conditions of employment encompassing a mandatory subject of bargaining, it must give their statutory bargaining representative notice of the intended change and an opportunity to bargain thereon. Respondent's failure to notify the Union, as alleged, violates Section 8(a)(5) and (1) of the Act.

(2) Further alleged violations of Section 8(a)(5) of the Act

The complaint alleges further violations of Section 8(a)(5) of the Act: that since the July 12 election, Respondent's unilateral reduction of hours of unit employees without giving the Union notice and an opportunity to bargain violates Section 8(a)(5) of the Act. I have already found, above, that Thomason's loss of the container runs violates Section 8(a)(3) of the Act because of discriminatory motivation. I need not pass on whether Respondent's actions with regard to Thomason also violated Section 8(a)(5) of the Act. On the above discussion, however, I find that a bargaining violation occurred with regard to other unit employees when Respondent, on or about August 15, forbade its furniture movers to work in the warehouse thereby supplementing their hours of work and gross pay notwithstanding that it was in retaliation for their support of the Union. Gavette credibly testified on this change (Tr. 143–144). This August 15 announcement of the unilateral change in employees' working hours and permissible workplaces violates Section 8(a)(5) because Respondent declared the change in policy without notifying the Union or giving it an opportunity to bargain over the loss of hours of all unit employees who had previously been permitted to work in the warehouse to accumulate a greater number of hours and gross pay. These changes are changes in mandatory subjects of bargaining.

The complaint also alleges that the August 15 unilateral changes concerning employee parking, telephone use, access to the warehouse and administrative offices, previously found violative of Section 8(a)(3) also are violations of Section 8(a)(5) and (1) of the Act because Respondent failed to give the Union notice and an opportunity to bargain with respect to such changes. The record discloses no such prior notification of the August 15 changes and I find that the changes, as alleged, also violate Section 8(a)(5) and (1) of the Act.

Similarly, I find that the October 10 and November 29, 1991 unilateral, postelection change in the enforcement of Respondent's attendance policy, with regard to lateness, also violate Section 8(a)(5) and (1) of the Act, as alleged, since Respondent neither notified nor gave the Union an opportunity to bargain prior to making those changes with regard to the enforcement of its attendance policy. Again, no emergency or other condition was shown to relieve Respondent of this statutory obligation.

Furthermore, the complaint alleges that Respondent's January 3, 1992 unilateral change of policy regarding employees remaining on premises after punching out also violated Section 8(a)(5) and (1) of the Act because Respondent initiated that policy without giving the Union prior notice thereof and an opportunity to bargain. As with other above unilateral acts. Respondent urges that it was ignorant of an obligation to notify the Union prior to making the change. On the record, Respondent's subjective attitude was not innocent ignorance; it was, if anything, conscious rejection.

To the extent that Respondent defends on the ground that these unilateral changes are not unilateral changes in mandatory subjects of bargaining I believe that it is in error and that changes in established practices involving employee parking, telephone use, enforcement of lateness and attendance policies, and remaining on premises are all changes in mandatory subjects of bargaining. *Kansas National Education Assn.*, 275 NLRB 638, 639 (1975).

To the extent Respondent further defends on the ground that Respondent had a legitimate ''urgent need to make adjustments'' in the rules concerning parking and forcing employees who have punched out to leave the premises, such a defense does not meet all of the above allegations of a violation of Section 8(a)(5). To the extent that there is a suggestion of urgency with regard to the unilateral parking change, Respondent introduced no evidence to support its claim of urgency. To the extent that there was an urgent need to require employees who have punched out to leave the premises to prevent stealing, it should be noted that there was already in existence a Respondent rule requiring discharge of employees who steal Respondent's or a customer's property, and that, to the extent that there is a relationship between employees remaining on the premises and the stealing of property, there was in any event, no proof of urgency and certainly no proof of an urgency which would require dispensing with notifying the Union and giving the Union an opportunity to respond, much less to bargain, on the proposed change. I find, on the basis of the record, considered as a whole, that Respondent's change in policy and practice, regarding employees remaining on the premises after punching out, violated Section 8(a)(5) and (1) of the Act because it changed the relationship between Respondent and its unit

employees, was accomplished without prior notice to the Union and without affording the Union a meaningful opportunity to bargain. *Kansas National Education Assn.*, 275 NLRB 638, 639 (1985).

(2) There remain two further allegations[13] of a violation of Section 8(a)(5) and (1) of the Act

(a) That beginning on or about November 18, 1991, Respondent unilaterally shifted its bargaining unit work to nonbargaining unit employees without giving the Union prior notice and affording it meaningful opportunity to bargain; and (b) since on or about September 5, 1991, Respondent unreasonably delayed meeting with or agreeing to meet with the Charging Party Union for purposes of collective bargaining.

(a) *The alleged unlawful unilateral shift of bargaining unit work to nonbargaining unit employees*

I have found, above, that Respondent's ''tightening up'' of the attendance policy rules, including, lateness, and ''no-shows'' because the employees selected the Union as their statutory representative violated Section 8(a)(3) and (5) of the Act. Consistent with that finding, I concluded, above, that Respondent's 30-day suspension of Rodriguez violated Section 8(a)(3) and (1) of the Act because it was a result of Respondent unlawfully and openly enforcing its rule, not historically enforced, against Rodriguez, in particular, because of his known support of the Union. Its openly favorable disparate treatment of newly hired Steve Greenwood (Wyzgoski giving him merely two oral warnings for no-shows), underscores Wyzgoski's and Treanor's animus in applying the newly strict enforcement of the rule to Rodriguez. As noted above, neither President Treanor nor Dispatcher Wyzgoski denied Rodriguez' testimony that they separately told him that Respondent would no longer permit the employees, i.e., the entire unit, to get away with lateness because they chose the Union as their bargaining representative in the Board election. This unilateral change, without prior notification to the Union, constitutes a change in a mandatory element and violates Section 8(a)(5).

As further above found, Respondent, in violation of Section 8(a)(3) of the Act, no longer permitted its otherwise unoccupied furniture movers to perform warehouse work in order to increase their hours and gross pay.

In the period November 18 through December 7, 1991, warehouseman Thomason was on medical leave. During Christmas week 1991, he was on vacation.

The evidence shows that employees Rodriguez, Tony Brown, Nurburger, and apparently employees Stamps and Gavette were all proficient warehouse workers (Tr. 57–58). Wyzgoski admitted that employees other than Rodriguez were capable of performing Thomason's duties in the warehouse (Tr. 496–498).

During Thomason's November–December absence due to illness and during his Christmas vacation, and while Rodriguez was on the unlawful disciplinary 30-day layoff (commencing November 18, 1991), these other employees were not called into the warehouse to perform warehouse duties. It was Supervisor Wyzgoski and Vice President Rick Treanor who performed the Warehouse duties on a regular basis (Tr. 469–484; G.C. Exhs. 15–24).

If Rodriguez had not been on a (unlawful) 30-day disciplinary layoff, commencing November 18, 1991, he would have filled in at the warehouse for Thomason during that period and in the period (after the disciplinary layoff) of Thomason's Christmas vacation. Similarly, if more employees than Rodriguez were needed, other employees who had proved proficient in performing warehouse duties could have been employed in the warehouses.

On July 12, the unit employees chose the Union as their collective-bargaining representative and on July 22, 1991, the Union was certified. At all material times prior to such actions, warehouse duties were performed by unit employees. Commencing certainly no later than the certification of the Union on July 22, Respondent was not free to cause the performance of unit work by supervisors where the past practice had been to have this work performed by unit employees. The uncontradicted Thomason testimony is that after the union election, Dispatcher Wyzgoski and President Treanor told him that no one was to work in the warehouse unless directed by Respondent. The record shows that after the union election, the employees, including Rodriguez, who had normally worked in the warehouse, were no longer permitted to work in the warehouse. Their work was done by two summer-help employees and thereafter by Dispatcher Wyzgoski.

The complaint alleges that commencing November 18, after the summer-help employees left, Respondent violated Section 8(a)(5) and (1) of the Act by permitting Dispatcher Wyzgoski to perform the work rather than the unit employees who erstwhile performed that work. The performance or transfer of unit work by or to nonunit employees, i.e., supervisors, is a mandatory subject of collective bargaining. *Maintenance Service Corp.*, 275 NLRB 1422, 1427 (1975). When Respondent, commencing on or after November 18, 1991, caused a unilateral change in its use of unit employees to perform unit work and by having Dispatcher Wyzgoski or Vice President Treanor perform the work, it violated Section 8(a)(5) and (1) of the Act because it failed to notify and bargain with the Union prior to having a supervisor perform the unit work thereby displacing unit employees. See *J. W. Rex Co.*, 308 NLRB 473, 498 (1992); *Harris-Teeter Supermarkets*, 307 NLRB 1075 (1992); *Brunswick Electric Membership Corp.*, 308 NLRB 361 (1992).

(b) Alleged violation of Section 8(a)(1) and (5) of the Act; unreasonable delay in meeting with or agreeing to meet with the Union

In late July, following the July 12 election, Union Organizer Thomas Ziembovic telephoned Respondent and spoke

[13] A third alleged violation of Sec. 8(a)(5)—par. 15(a)—asserts, as unlawful, the unilateral reduction of the hours ''. . . of certain unit employees.'' I have already found that Respondent violated Sec. 8(a)(3) of the Act in its retaliatory reduction of hours of certain employees. The evidence shows that postelection, Respondent reduced hours by the devices of changing its policy of permitting helpers to work in the warehouses and transferring work (container runs) amongst unit employees. Respondent must refrain from such conduct, whether or not discriminatory, starting from the ballot victory. It must refrain from changes in unit employee working conditions which are mandatory subjects of bargaining, such as hours of work and pay. Cf. *Consolidated Printers*, 305 NLRB 1061 (1992), and cases cited; *Nave, Inc.*, 306 NLRB 926 (1992); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982). By such conduct, as alleged, Respondent violated Sec. 8(a)(5) and (1) of the Act.

with Vice President Rich Treanor. Treanor said that he would call Ziembovic regarding future negotiation dates. He did not do so. Thereafter, Ziembovic telephoned Treanor and set up a collective-bargaining session for September 4, 1991. Representing the Union, on September 4, were Ziembovic and Jim Cianciola, secretary-treasurer of the Charging Party. Ziembovic testified that both he and Cianciola were responsible for contacting Respondent regarding the establishment of negotiations. At this meeting, the Union provided copies of its contract proposals and requested that the parties establish dates for collective-bargaining sessions. Respondent refused and said that it would get back to the Union (Tr. 248). The next day however, when Ziembovic and Vice President Rich Treanor had a telephone conversation in which the Union tried to obtain meeting dates, Treanor told him that there were some omissions in the Union's contract proposals including ''cola'' language and missing work rules (Tr. 249). Ziembovic told Treanor that he would immediately fax the missing materials to him and he did so (G.C. Exh. 8; Tr. 249). Treanor said that he would be in touch with Ziembovic after he received the missing material, but he failed to do so and Ziembovic made further phone calls to reach Treanor.

On September 11, Ziembovic wrote to President Treanor regarding contract negotiations, affirmed that he had faxed the missing material to Respondent, and said that Vice President Treanor had failed to contact him as he had promised to do. Ziembovic offered eight meeting dates as suitable for collective bargaining and requested a response as soon as possible with regard to the establishment of collective-bargaining negotiations (G.C. Exh. 9). During the next 2 weeks, Ziembovic testified that he tried to reach Respondent by phone but failed to make contact.

President Don Treanor testified that he telephoned Cianciola two or three times and left messages with the office clerical who answered the phone in which he identified himself and requested a phone call back. In addition, Treanor testified that after the September 4 meeting, he telephoned Secretary-Treasurer Cianciola and told him that Respondent needed time to find legal counsel for the negotiations. Although President Treanor testified that he could not recall what Cianciola's response was, he recalls that when he told Cianciola that Respondent needed time to find a lawyer, Cianciola merely grunted and moaned ''something like that'' (Tr. 368).

Respondent acknowledges (R. Br. 2) that Ziembovic accused Respondent of failing to respond to his phone calls.

On September 23, 1991, President Treanor wrote (R. Exh. 4) to Ziembovic stating that Respondent's legal representative desired a complete copy of the contract proposal, reminding the Union that there had been some typing errors and omissions in its previous submissions. President Treanor said that after he received the documents and the attorney reviewed them, they would set up a meeting.

On the next day, September 24, 1991, apparently without having received Respondent's September 23, 1991 letter (R. Exh. 4), Ziembovic and Cianciola wrote to Respondent (G.C. Exh. 10) reminding them that on September 11, the Union had faxed a list of dates to schedule contract negotiations and had left two phone messages requesting a return call and that there had been no response to either. On September 25, the Union filed its unfair labor practice charge alleging, inter alia, the refusal to negotiate with the Union (G.C. Exh. 1(a)). The Postal Service green card receipt shows that this unfair labor practice charge (Case 7–CA–22367), served by certified mail, was received by Respondent on September 30, 1991.

On October 3, 1991, President Treanor wrote to Secretary-Treasurer Cianciola asserting that there was a '' communication problem'' and requested Cianciola to contact him. Regarding the Union's September 24, 1991 letter (G.C. Exh. 10), in which the Union requested meeting dates, President Treanor again requested that the Union forward a complete copy of the Union's contract proposals for review by its attorney. President Treanor noted that this was his second request for the information and stated that, after review, Respondent would set a meeting date with the Union. President Treanor also stated that he was sorry that he missed any phone messages but denied having received them from Cianciola or Ziembovic (R. Exh. 5).

On October 2, 1991, the Union responded to Respondent's September 23 letter (R. Exh. 4) without, of course, having received Respondent's October 3, 1991 letter (R. Exh. 5). Responding therefore to Respondent's September 23 letter (R. Exh. 4), the Union not only reminded Respondent that it had faxed the missing language to Respondent on September 10, 1991, but it nevertheless again mailed the two omitted proposals in the October 2 letter. The Union accused Respondent of failing to bargain and denied that Respondent had returned any of the Union's phone calls which attempted to schedule collective-bargaining sessions (G.C. Exh. 11).

On October 15, 1991, President Treanor wrote to Ziembovic, acknowledging receipt of the allegedly missing materials, asserted that the Union had failed to return President Treanor's phone calls and stated that Respondent would soon contact the Union to discuss dates for future collective-bargaining sessions. President Treanor stated that Respondent gave no weight to the Union's continued insistence on dates for collective bargaining because the Union had failed to remit the missing materials. (R. Exh. 6).

In response, Ziembovic, on October 21, 1991, noted that the reason that the Union had not returned Respondent's phone calls was that Respondent had never telephoned the Union. In further response, Ziembovic reminded President Treanor that the missing materials had been faxed to Respondent on September 10 and were also mailed on October 2. Ziembovic said that Respondent had had the proposal for some time and still was refusing to set up meeting dates for negotiations. Lastly, Ziembovic provided three prospective dates for collective bargaining, asserting that the Union was willing to bargain 24 hours a day.

On October 31, 1991, President Treanor wrote to the Union (R. Exh. 7) that he had reserved a hotel room for bargaining commencing on the morning of November 7, 1991 (R. Exh. 7).

Subsequent to the November 7, 1991 collective-bargaining session, there appear to have been several further collective-bargaining sessions (Tr. 270–271).

Discussions and Conclusions

The complaint (par. 15(c)) alleges an unreasonable delay in meeting, or agreeing to meet, for collective bargaining occurred since on or about September 5, 1991. It would appear, therefore, that apart from perhaps shedding light on events

after September 5, 1991, none of Respondent's conduct prior to that time itself constitutes an unreasonable delay.

Shortly after that initial September 4 meeting of the parties, at which the Union presented its contract proposals, there is unrebutted, somewhat hazy testimony by President Treanor that he telephoned Secretary-Treasurer Cianciola, advised him of Respondent's need for time to find legal representation in negotiations and that Cianciola did not object to the request. Cianciola was not called to deny Treanor's testimony. In addition, the General Counsel does not deny that there were at least two serious textual omissions from the Union's contract proposals presented to Respondent at the September 4 meeting. While it may be true that the Union faxed these materials to Respondent as early as September 10, 1991, there was no proof adduced by the Union or the General Counsel to contradict Treanor's testimony that some portions of the material, faxed to Respondent on September 10, were in fact, not legible (Tr. 265–266) and that a further faxing was necessary. Moreover, the General Counsel not only failed to produce Secretary-Treasurer Cianciola to deny or explain the alleged ''no objection'' response to President Treanor's phone call (requesting additional time to seek counsel) but also failed to present any evidence denying that President Treanor repeatedly and unsuccessfully telephoned the Union but nevertheless left his name. In short, the General Counsel failed to present the Union's office clerical to deny President Treanor's testimony of having answered Ziembovic's telephone calls. These omissions, whatever doubts I hold on Treanor's veracity, cause me to infer that General Counsel cannot successfully attack Respondent's testimony. *International Automated Machine*, 285 NLRB 1122, 1123 (1987).

Respondent, on September 23, 1991, wrote to Ziembovic (R. Exh. 4) mentioning the existence of typing errors and omissions from the contract proposal and requesting time to review a completed document with its attorney. This Respondent September 23 letter was written to the Union *before* the Union filed its September 25 unfair labor practice charge alleging Respondent's stalling in setting a date for negotiations. By October 3, Respondent, answering the Union's September 24 letter (G.C. Exh. 10, requesting dates for collective-bargaining sessions), reminded the Union that it was again requesting a complete contract proposal for review by Respondent's attorneys (R. Exh. 5). Unknown to Respondent, the Union, on October 2, by mail (G.C. Exh. 11) transmitted copies of the contract proposals. By October 15, Respondent acknowledged receipt of the complete contract proposal and stated that it would review it with its attorney and get back to the Union. By October 31, Respondent had reserved a room for collective bargaining (R. Exh. 7).

On the above record, the period between September 5 and October 15 was occupied by Respondent's insistence on a complete, legible copy of the Union's contract proposals; the Union's (Secretary-Treasurer Ciancola's) apparent acquiescence in the Respondent's demand for time to get an attorney and thereafter to review the Union's contract proposal; and the General Counsel's failure to present evidence, contradicting Treanor, that there was no union acquiescence in a delay and that there were no phone calls from Treanor. On such a record, while there would seem, to be little question that Respondent was just finished telling its employees that they would never get a contract and was not in a great hurry to establish collective-bargaining dates with the Union, much less to engage in collective bargaining, the circumstances surrounding the Respondent's failure to act with alacrity may be laid at the doorstep of the Union. The Union must take responsibility for (a) submitting a contract proposal with material omissions; (b) thereafter acquiescing in Respondent's demand for more time to seek an attorney; (c) submitting illegible copies of its proposals. Under these circumstances, I shall recommend to the Board that the General Counsel's allegation, that since September 5, 1991, Respondent unreasonably delayed in meeting with or agreeing to meet with the Union for purposes of bargaining, be dismissed as unproven.

CONCLUSIONS OF LAW

1. American Warehousing & Distribution Services, Inc., d/b/a Treanor Moving & Storage Company, Inc. (Respondent), at all material times, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 243, International Brotherhood of Teamsters, AFL–CIO (the Union), at all material times has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, helpers and warehouse employees employed by the Respondent at or out of its facilities located at 25 West Walton Boulevard, Pontiac, Michigan, and at or out of its facility located at 5321 Dixie Highway, Drayton Plains, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

4. On July 22, 1991, the Regional Director for Region 7 of the National Labor Relations Board certified the Union and the exclusive bargaining representative of the employees of Respondent in the above-appropriate unit in Case 7–RC–19604.

5. Since July 22, 1991, by virtue of Section 9(a) of the Act, the Union has been, and now is, the exclusive representative of all employees in the above-appropriate unit for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

6. Respondent, in violation of Section 8(a)(5) and (1) of the Act, has refused to bargain collectively with the Union as the exclusive representative of its employees in the above-described unit in that:

(a) Since on or about August 15, 1991, Respondent unilaterally changed its policies regarding unit employee parking, telephone use, and access to the warehouse and administrative offices without giving the Union prior notice of such changes and affording the Union a meaningful opportunity to bargain about such changes.

(b) Since on or about July 12, 1991, Respondent unilaterally reduced the hours of unit employees and on or about October 10, 1991, Respondent unilaterally changed its policy and practice regarding enforcement of its attendance policy of unit employees without giving the Union prior notice

thereof and affording it a meaningful opportunity to bargain about such change.

(c) Since on or about November 18, 1991, Respondent unilaterally shifted bargaining unit work to nonbargaining unit employees without giving the Union prior notice thereof and affording it a meaningful opportunity to bargain.

(d) Since on or about January 3, 1992, Respondent unilaterally changed its policy and practice regarding employees remaining on its premises after punching out without giving the Union prior notice thereof and affording it a meaningful opportunity to bargain about the change.

7. Respondent has interfered with, restrained, and coerced and is continuing to interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) of the Act by the following acts at its Pontiac facility:

(a) On or about July 11 September and October 1991, Respondent, by its president and agent, Don Treanor, informed various employees that it would be and (after July 12) was futile for them to select the Union as their bargaining representative in that they would never get a union contract.

(b) Since on or about August 1991, and at various times since, Respondent, by its agent and president, Don Treanor, threatened to accord employees less favorable treatment as a consequence of their having selected the Union as their collective-bargaining representative.

(c) In or about October 1991, Respondent, by its agents, Tom Wyzgoski and Don Treanor, threatened its employee, David Thomason, by telling him that he had more to lose than other employees by supporting the Union.

(d) On or about October 10, 1991, and thereafter on or about November 18, 1991, Respondent, by its agents, Tom Wyzgoski and Don Treanor, also its president, announced that it would strictly enforce Respondent's attendance policy because the employees had chosen the Union as their collective-bargaining representative.

8. Since on or about July 13, 1991, Respondent, by its agent and president, Don Treanor, reduced the work hours of unit employees including David Thomason, Ray Rodriguez, Gary Gavette, and Casey Stamps in violation of Section 8(a)(3) and (1) of the Act because of their activities on behalf of and support of the Union and because of the Union's victory in the July 12, 1991 Board-conducted election.

9. Since on or about August 15, 1991, Respondent, in violation of Section 8(a)(3) and (1) of the Act, changed its policy regarding employee automobile parking, telephone use, access to the warehouse and administrative portions of its offices because of the employees' activities on behalf of and in support of the Union and because of the Union's victory in the July 12, 1991 Board-conducted election.

10. Since on or about October 1991, Respondent, by its agent, Tom Wyzgoski, in violation of Section 8(a)(3) and (1) of the Act, changed its policy and practice regarding enforcement of its attendance policy thereby unlawfully disciplining employees Rodriguez, Gavette, and Stamps because of employee activities on behalf of and in support of the Union and because of the Union's victory in the July 12, 1991 Board-conducted election.

11. The General Counsel failed to prove the Respondent violated the Act in any other regard.

THE REMEDY

I shall recommend to the Board that Respondent be ordered to cease and desist from its union labor practices, including its discriminatory practices as opposed in appropriate notice.

I shall also recommend that Respondent restore to its employees the rights it discriminatorily removed. In addition, in order to remedy the effects of Respondent's unlawful refusal to recognize and bargain with the Union prior to making unilateral changes in the unit employees' terms and conditions of employment, and in order to affirmatively remedy its discriminatory practices, I shall recommend that Respondent make each of its affected employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful discrimination and unilateral changes in terms and conditions of employment. All such sums shall be calculated in accordance with the methods set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the above finding of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, American Warehousing & Distribution Services, Inc., d/b/a Treanor Moving & Storage Company, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local No. 243, International Brotherhood of Teamsters, AFL–CIO (the Union), as the exclusive bargaining representative of employees in the below-described appropriate unit by making unilateral changes in terms and conditions of employment which are mandatory subjects of bargaining, without first giving adequate prior notice thereof to the union and giving the Union a meaningful opportunity to bargain on such changes, including unilaterally reducing the hours of unit employees; changing policies and practices regarding employee parking, telephone use, access to the warehouse and administrative offices; changing policy and practice regarding enforcement of its attendance policy; and changing policy and practice regarding employees remaining on the premises after punching out:

> All full-time and regular part-time drivers, helpers and warehouse employees employed by the Respondent at or out of its facilities located at 25 West Walton Boulevard, Pontiac, Michigan, and at or out of its facility located at 5321 Dixie Highway, Drayton Plains, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(b) Discriminating against unit employees by reducing the work hours of certain unit employees because of their activi-

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ties on behalf of and support of the Union or because of the Union's victory in the July 12, 1991 National Labor Relations Board election.

(c) Discriminating against its unit employees by retaliating against them because of their activities on behalf of and support of the Union and because of the Union's victory in the July 12, 1991 National Labor Relations Board election by changing its policies regarding employee parking, telephone use, access to the warehouse and administrative portions of the office, and by discriminatorily enforcing its attendance policy.

(d) Informing employees that it would be/was futile for them to select the Union as their collective-bargaining representative and that they would never get a contract.

(e) Threatening employees with less favorable treatment as a consequence of their having selected the union representation.

(f) Telling any employee that he had more to lose than other employees by supporting the Union.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning wages, pay rates, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract.

(b) Forthwith, at the Union's request, reinstate all wages, hours, work assignments, including container runs, rights to work in the warehouse, and other terms and conditions of employment which Respondent unilaterally changed on and after the Board-conducted election of July 12, 1991.

(c) Offer to all unit employees found subject to Respondent's unlawful unilateral or discriminatory acts as found herein, full and immediate reinstatement to their former positions, work assignments and rights to work as they existed on July 12, 1991, or prior to Respondent's subsequent unlawful actions against them or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed; and make each of them whole for any loss of wages and benefits they may have suffered by virtue of Respondent's unlawful actions against them.

(d) On request of the Union, bargain in good faith with Local No. 243, International Brotherhood of Teamsters, AFL–CIO, as the exclusive bargaining representative of unit employees with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract.

(e) Expunge and remove from its files any memoranda, records, or other references to the unlawful November 18, 1991 suspension of Ray Rodriguez, and the unlawful suspensions of Gavette and Stamps and notify them in writing, that this has been done and that these disciplinary actions will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities located in Pontiac and Drayton Plains, Michigan, copies of the attached notice marked ''Appendix.''[15] Copies of the notice on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local No. 243, International Brotherhood of Teamsters, AFL–CIO (the Union), as the exclusive bargaining representative of employees in the below-described appropriate unit by making unilateral changes in terms and conditions of employment which are mandatory subjects of bargaining, without first giving adequate prior notice thereof to the Union and giving the Union a meaningful opportunity to bargain on such changes, including reducing the hours of unit employees; changing policies and practices regarding employee parking, telephone use, access to the warehouse and administrative offices; changing policies and practices regarding enforcement of its attendance policy; and unilaterally changing policy and practice regarding employees remaining on the premises after punching out:

> All full-time and regular part-time drivers, helpers and warehouse employees employed by the Respondent at or out of its facilities located at 25 West Walton Boulevard, Pontiac, Michigan, and at or out of its facility located at 5321 Dixie Highway, Drayton Plains, Michigan; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT discriminate against unit employees by reducing the work hours of certain unit employees because of their activities on behalf and support of the Union or because

of the Union's victory in the July 12, 1991 National Labor Relations Board election.

WE WILL NOT discriminate against our unit employees by retaliating against them because of their activities on behalf and support of the Union or because of the Union's victory in the July 12, 1991 National Labor Relations Board election by changing our policies regarding employee parking, telephone use, access to the warehouse, and administrative portion of the office; and by discriminatorily enforcing our attendance policy.

WE WILL NOT inform our employees what it would be/was futile for them to select the Union as their collective-bargaining representative and that they would never get a contract; nor will we threaten employees with less favorable treatment as a consequence of their having selected the Union as their bargaining representative; nor will we tell any employee that he had more to lose than other employees by supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, on request of the Union, bargain in good faith with the Union as the exclusive representative of our employees in the above-described appropriate unit concerning wages, rates of pay, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract.

WE WILL forthwith at the Union's request, reinstate all wages, hours, work assignments including container runs, rights to work in the warehouse, and other terms and conditions of employment which we unlawfully changed on and after the Board-conducted election of July 12, 1991.

WE WILL offer to all unit employees found subject to our unlawful unilateral or discriminatory acts as found herein, full and immediate reinstatement to their former positions, work assignments and rights to work, as they existed on July 12, 1991, or prior to our subsequent unlawful actions against them or, if those positions, assignments, and rights no longer exist, to substantially equivalent positions, assignments, or rights without prejudice to employees' seniority or other rights or privileges previously enjoyed; and make each of them whole for any loss of wages and benefits they may have suffered by virtue of our unlawful actions against them.

WE WILL notify employees Rodriguez, Gavette, and Stamps that we have removed and expunged from our files and records any references to their unlawful suspensions and that any such memoranda of discipline will not be used against them in any way.

AMERICAN WAREHOUSING & DISTRIBUTION SERVICES, INC., D/B/A TREANOR MOVING & STORAGE COMPANY, INC.